Argued -
Jr. Atty Clifford -

SUPREME COURT OF THE UNITED STATES.

No. ~~220.~~ 132

ALLEN ROBBINS, PLAINTIFF IN ERROR,

vs.

THE CITY OF CHICAGO.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

GOVERNMENT PRINTING OFFICE.

SUPREME COURT OF THE UNITED STATES.

No. 220.

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vs.

THE CITY OF CHICAGO.

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1 Pleas in the circuit court of the United States of America within and for the northern district of Illinois, held at the city of Chicago, in the district aforesaid, before the Hon. David Davis, one of the justices of the Supreme Court of the United States, presiding judge, and the Hon. Thomas Drummond, district judge of said district and associate judge of said circuit court, on Tuesday, the twenty-sixth day of July, in the July term of said court, in the year of our Lord one thousand eight hundred and sixty-four, and of our independence the eighty-ninth year.

WILLIAM H. BRADLEY, *Clerk.*

THE CITY OF CHICAGO
vs.
ALLEN ROBBINS.

NORTHERN DISTRICT OF ILLINOIS, *ss:*

2 Be it remembered, that on the first day of March, in the year of our Lord one thousand eight hundred and fifty-eight, came said Allen Robbins, by Messrs. Stuart and Ayer, his attorneys, and filed in the clerk's office of the circuit court of the United States for the northern district of Illinois, at Chicago, in said district, a precipe, declaration, petition, and bond, which had been removed from the Cook County court of common pleas, and also a transcript of the record of said court, which said precipe, declaration, petition, bond, and transcript are in the words and figures following, to wit:

A.—*Præcipe.*

Cook County court of common pleas.

CITY OF CHICAGO
vs.
ALLEN ROBBINS.

Please issue a summons in the above-entitled cause, directed to the sheriff of Cook County, action trespass on the case, damages $25,000, and oblige, yours truly,

JOHN C. MILLER, *Pl'ff's Att'y.*

To WALTER KIMBALL, Esq., *Clerk of Cook County Court of Common Pleas.*

3 Endorsed: Filed January 16, 1858.

W. KIMBALL, *Clk.*

Filed March 1st, 1858.

WM. H. BRADLEY, *Clerk.*

B.—*Declaration.*

STATE OF ILLINOIS, *Cook County, ss:*

In the Cook County court of common pleas, of the February term, A. D. 1858.

The city of Chicago, plaintiff in this suit, by John C. Miller, its attorney, complains of Allen Robbins, defendant in this suit, who has been summoned, &c., of a plea of trespass on the case, for that whereas the said plaintiff is a body corporate established and existing under the laws of the State of Illinois, and having by its charter exclusive power over the public streets of the said city, in the county of Cook aforesaid, and it being the duty of the said plaintiff to remove and abate any nuisances and obstructions on the said streets, to control, regulate, and repair the same, and to protect the same from any

4 encroachments or injury; and whereas the said defendant, before and at the time of committing the grievance hereinafter next mentioned, was possessed of a certain building, with the appurtenances, situate and being

in a certain street in the said city, in the county aforesaid, called Wells street, which said street at the time of the committing of the said grievance, and from thence hitherto has been and still is, a common public street or highway for all persons to go, return, pass and repass in, by, and with horses, carriages, and otherwise, at their free will and pleasure, to wit, at the county aforesaid: yet the said defendant, well knowing the premises, whilst he was so possessed of the said building, with the appurtenances as aforesaid, to wit, on the twenty-eighth day of December, A. D. 1856, at the county aforesaid, wrongfully and unjustly dug, opened, and made in the said street and highway, on the eastern side thereof, next to and adjoining the said building, a large pit or hole of great length, width, and depth, to wit, of the length of
5 one hundred feet, of the width of four feet, and of the depth of fifteen feet, and wrongfully and injuriously suffered the said pit or hole to remain during the said day and during the night time of the said day wholly uncovered and unguarded, and without any sign or warning of danger to the persons passing along the said street or highway, by means and in consequence of which said negligence and improper conduct of the said defendant in that respect, afterwards, to wit, on the said twenty-eighth day of December, A. D. 1856, between the hours of seven and nine o'clock in the evening of the said day, to wit, at the county aforesaid, one William H. Woodbury, then and there in the exercise of ordinary care and prudence for his personal safety, lawfully going and passing over said street, fell and was violently thrown into the said pit or hole, and was then and there greatly injured and damaged thereby, and then and there, by reason of the premises, the said William H. Woodbury, became sick, sore, and lame, and was obliged to expend large sums of money in endeavoring to be cured of the said
6 wounds and injuries received as aforesaid, to wit, the sum of one hundred dollars; and by reason of the premises, the said William H. Woodbury was prevented from performing and transacting his lawful affairs to be by him performed and transacted, and was otherwise greatly injured and damaged thereby; and in order to obtain compensation for the injuries and damages so sustained by the said William H. Woodbury as aforesaid, and which were so as aforesaid occasioned by the negligence and improper conduct of the said defendant, he, the said William H. Woodbury, at a term of this honorable court began and holden at Chicago, in the county aforesaid, on the first Monday in February, A. D. 1857, caused an action at law to be brought against the said plaintiff in the said court, and such proceedings were thereupon had that afterwards, to wit, at the June special term of the said court, in the same year, it was adjudged by the court that the said William H. Woodbury should recover against the said plaintiff for his damages by him sustained in the premises the sum of fifteen thousand
7 dollars, and twenty-two dollars and twenty-five cents for his costs and charges by him about his suit in that behalf expended, whereof the said plaintiff was convicted, as by the record and proceedings thereof more fully appear, and upon which said judgment an execution by writ of fieri facias was afterwards, to wit, on the 13th day of July, A. D. 1857, at the county aforesaid, issued against the said plaintiff by the said William H. Woodbury, directed to the sheriff of the county of Cook aforesaid, whereby the said sheriff was commanded that of the lands and tenements, goods and chattels, of the said city of Chicago, he should cause to be levied the damages and costs aforesaid, and that he should have those moneys ready to render to the said William H. Woodbury for his said damages and costs, and make return of the said writ, with an endorsement thereon, in what manner he should have executed the same, in ninety days from the date thereof, which said writ before the delivery thereof to the said sheriff was duly endorsed, and was afterwards, to wit, on the day and year last aforesaid, at

the county aforesaid, delivered to the said sheriff to be executed in
8 due form of law; by virtue of which said writ the said sheriff afterwards and before the return of the said writ, to wit, on the day and year last aforesaid, at the county aforesaid, seized and took in execution divers goods and chattels, lands and tenements, of the said plaintiff, of great value, to wit, of the value of the monies endorsed on the said writ, and directed to be levied as aforesaid, by means of which said several premises, the said plaintiff was not only forced and obliged to pay, and did necessarily pay, to the said William H. Woodbury the said several sums of fifteen thousand dollars and twenty-two dollars and twenty five cents, but was also forced and obliged to pay, and did necessarily pay, the sum of sixty-four dollars and ninety-nine cents for interest on the said sum of fifteen thousand dollars, and the sum of one hundred and eight dollars and seventy cents for sheriff's fees on the said execution so as aforesaid issued by the said William H. Woodbury on the said judgment, and was also forced and obliged to expend, and did necessarily expend, divers other sums of money in and
9 about defending the said writ and proceeding of the said William H. Woodbury, in the whole amounting (exclusively of the said sums of fifteen thousand dollars and twenty-two dollars and twenty-five cents) to a large sum of money, to wit, the sum of five thousand dollars, and was and is by means of the premises otherwise greatly injured and damnified, to wit, at the county aforesaid. And also for that whereas, before and at the time of the committing of the grievances by the said defendant as hereinafter mentioned, there was, and from thence hitherto has been and still is, a certain other street in the said city, in the county aforesaid, for all persons to go, return, pass, and repass in, by, and with horses, carriages, and otherwise, at their free will and pleasure: yet the said defendant, well knowing the premises, heretofore, to wit, on the day and year aforesaid, at the county aforesaid, wrongfully and unjustly dug, opened, and made in the said street a large pit or hole of great length, width, and depth, to wit, of the length of one hundred feet, of the width of four feet, and depth of fifteen feet, and
10 wrongfully and injuriously suffered the said pit or hole to remain during the said day and during the night time of the said day wholly uncovered and unguarded, and without any sign or warning of danger to the persons passing along the said street, by means and in consequence of which said negligence and improper conduct of the said defendant in that respect, afterwards, to wit, on the day and year aforesaid, between the hours of seven and nine o'clock in the evening of the said day, to wit, at the county aforesaid, one William H. Woodbury, then and there in the exercise of ordinary care and prudence for his personal safety, lawfully going and passing over said street, fell and was violently thrown into the said pit or hole, and was then and there greatly injured and damaged thereby, and then and there, by reason of the premises, the said William H. Woodbury became sick, sore, and lame, and was obliged to expend large sums of money in endeavouring to be cured of the said wounds and injuries received as aforesaid, to wit, the sum of one hundred dollars, and by reason of the premises the said William H. Woodbury was prevented from performing
11 and transacting his lawful affairs to be by him performed and transacted, and was otherwise greatly injured and damaged thereby; and in order to obtain compensation for the injuries and damages so sustained by the said William H. Woodbury as aforesaid, and which were so as aforesaid occasioned by the negligence and improper conduct of the said defendant, he, the said William H. Woodbury, at a term of this honorable court begun and holden at Chicago, in the county aforesaid, on the first Monday in February, A. D. 1857, caused an action at law to be brought against the said plaintiff in the said court, and such proceedings were thereupon had that

afterwards, to wit, at the June special term of the said court in the same year, it was adjudged by the said court that the said William H. Woodbury should recover against the said plaintiff for his damages by him sustained in the premises the sum of fifteen thousand dollars, and twenty-two dollars and twenty-five cents for his costs and charges by him about his suit in that behalf expended, whereof the said plaintiff was convicted, as by the
12 record and proceedings thereof more fully appear, and upon which said judgment an execution by writ of fieri facias was afterwards, to wit, on the thirteenth day of July, A. D. 1857, at the county aforesaid, issued against the said plaintiff by the said William H. Woodbury, directed to the sheriff of the county of Cook aforesaid, whereby the said sheriff was commanded that of the lands and tenements, goods and chattels, of the said city of Chicago he should cause to be levied the damages and costs aforesaid, and that he should have those moneys ready to render to the said William H. Woodbury for his said damages and costs, and make return of the said writ, with an endorsement thereon in what manner he should have executed the same, in ninety days from the date thereof, which said writ, before the delivery thereof to the said sheriff, was duly endorsed, and was afterwards, to wit, on the day and year last aforesaid, at the county aforesaid, delivered to the said sheriff to be executed in due form of law; by virtue of which said writ the said sheriff afterwards, and before the
13 return of the said writ, to wit, on the day and year last aforesaid, at the county aforesaid, seized and took in execution divers goods and chattels, lands and tenements, of the said plaintiff, of great value, to wit, of the value of the monies endorsed on the said writ and directed to be levied as aforesaid, by means of which said several premises the said plaintiff was not only forced and obliged to pay, and did necessarily pay, to the said William H. Woodbury the said several sums of fifteen thousand dollars and twenty-two dollars and twenty-five cents, but were also forced and obliged to pay, and did necessarily pay, the sum of sixty-four dollars and ninety-nine cents for interest on the said sum of fifteen thousand dollars, and the sum of one hundred and eight dollars and seventy cents for sheriff's fees on the said execution so as aforesaid issued by the said William H. Woodbury on the said judgment, and was also forced and obliged to expend, and did necessarily expend, divers other sums of money in and about defending the said suit and proceeding of the said William H. Woodbury, in the whole amounting (exclusively of the said sums of fifteen thousand dollars and twenty-two dollars and twenty-five cents) to a large sum of money,
14 to wit, the sum of five thousand dollars, and was and is by means of the premises otherwise greatly injured and damnified, to wit, at the county aforesaid.

And also for that whereas the said plaintiff is a body corporate established and existing under the laws of the State of Illinois, and having by its charter exclusive power over the public streets of the city of Chicago, in the county aforesaid, and it being the duty of the said plaintiff to remove and abate any nuisances and obstructions on the said streets, to control, regulate, and repair the same and to protect the same from any encroachment or injury; and whereas the said defendant, before and at the time of committing the grievance hereinafter next mentioned, was possessed of a certain building, with the appurtenances, situate and being in a certain street in the said city and county, called Wells street, which said street, at the time of the committing of the said grievance, and from thence hitherto has been and still is, one of the public streets of the said city of Chicago, for all persons to go, return, pass, and repass at their free will and pleasure, to wit, at the county aforesaid: yet the said defendant, well knowing the premises
15 whilst he was so possessed of the said building, with the appurtenances,

aforesaid, to wit, on the twenty-eighth day of December, A. D. 1856, at the county aforesaid, wrongfully and unjustly dug, opened, and made in the said street, on the eastern side thereof, next to and adjoining the said building, a large pit or hole of great length, width, and depth, to wit, of the length of one hundred feet, of the width of four feet, and of the depth of fifteen feet, and wrongfully and injuriously suffered the said pit or hole to remain during the said day, and during the night time of the said day, wholly uncovered and unguarded, and without any sign or warning of danger to the persons passing along the said street, by means and in consequence of which said negligence and improper conduct by the said defendant in that respect, afterwards, to wit, on the said twenty-eighth day of December, A. D. 1856, between the hours of seven and nine o'clock in the evening of the said day, to wit, at the county aforesaid, one William H. Woodbury, then and there in
the exercise of ordinary care and prudence for his personal safety,
16 lawfully going and passing over the said street, fell and was violently thrown into the said pit or hole, and was then and there greatly injured and damaged thereby, and then and there, by reason of the premises, the said William H. Woodbury became sick, sore, and lame, and was obliged to expend large sums of money in endeavoring to be cured of the said wounds and injuries received as aforesaid, to wit, the sum of one hundred dollars, and by reason of the premises the said William H. Woodbury was prevented from performing and transacting his lawful affairs to be by him performed and transacted, and was otherwise greatly injured and damaged thereby; and in order to obtain compensation for the injuries and damages so sustained by the said William H. Woodbury as aforesaid, and which were so as aforesaid occasioned by the negligence and improper conduct of the said defendant, he, the said William H. Woodbury, at a term of this honorable court begun and holden at Chicago, in the county aforesaid, on the first Monday in February, A. D. 1857, caused an action
17 at law to be brought against the said plaintiff in the said court; and the said plaintiff avers that due notice was given by the said plaintiff to the said defendant of the pendency of the said suit, with the option of defending the same if he should think fit so to do, but the said defendant neglected and refused to defend the said suit, and the said plaintiff thereupon caused the same to be defended with due and proper care, skill, and diligence; and the said plaintiff further says that such proceedings were had in the said suit that afterwards, to wit, at the June special term of the said court, in the same year, it was adjudged by the said court that the said William H. Woodbury should recover against the said plaintiff, for his damages by him sustained in the premises, the sum of fifteen thousand dollars, and twenty-two dollars and twenty-five cents for his costs and charges by him about his suit in that behalf expended, whereof the said plaintiff was convicted, as by the record and proceedings thereof more fully appear, and upon which said judgment an execution by writ of fieri fiacias was afterwards, to wit, on the 13th day of July, A. D. 1857, at the county aforesaid,
18 issued against the said plaintiff by the said William H. Woodbury, directed to the sheriff of the county of Cook aforesaid, whereby the said sheriff was commanded that of the lands and tenements, goods and chattels, of the said city of Chicago, he should cause to be levied the damages and costs aforesaid, and that he should have those moneys ready to render to the said William H. Woodbury for his said damages and costs, and make return of the said writ, with an endorsement thereon in what manner he should have executed the same, in ninety days from the date thereof, which said writ, before the delivery thereof to the said sheriff, was duly endorsed, and was afterwards, to wit, on the day and year last aforesaid, at the county aforesaid, delivered to the said sheriff to be executed in due form

of law; by virtue of which said writ the said sheriff afterwards and before the return of the said writ, to wit, on the day and year last aforesaid, at the county aforesaid, served and took in execution divers goods and chattels, lands and tenements, of the said plaintiff, of great value, to wit, of the
19 value of the monies endorsed on the said writ and directed to be levied as aforesaid, by means of which said several premises the said plaintiff was not only forced and obliged to pay, and did necessarily pay, to the said William H. Woodbury the said several sums of fifteen thousand dollars and twenty-two dollars and twenty-five cents, but was also forced and obliged to pay, and did necessarily pay, the sum of sixty-four dollars and ninety-nine cents for interest on the said sum of fifteen thousand dollars, and the further sum of one hundred and eight dollars and seventy cents for sheriff's fees on the said execution so as aforesaid issued by the said William H. Woodbury on the said judgment, and was also forced and obliged to expend, and did necessarily expend, divers other sums of money in and about defending the said suit and proceeding of the said William H. Woodbury, in the whole amounting (exclusively of the said sums of fifteen thousand dollars and twenty-two dollars and twenty-five cents) to a large sum of money, to wit, the sum of five thousand dollars, and was and is by reason
20 and means of the premises otherwise greatly injured and damnified, to wit, at the county aforesaid, to the damage of the said plaintiff of twenty-five thousand dollars, and therefore it brings this suit, &c.

JOHN C. MILLER, *Plaintiff's Attorney.*

Endorsed: Filed January 22, 1858.

W. KIMBALL, *Clerk.*

Filed March 1st, 1858.

WM. H. BRADLEY, *Clerk.*

C.—*Petition.*

In the court of common pleas for the county of Cook, in State of Illinois' February term, A. D. 1858.

ALLEN ROBBINS *ads.* THE CITY OF CHICAGO.

To the honorable the Cook County court of common pleas:

Respectfully represents Allen Robbins, defendant in the above-en-
21 titled suit, that the said suit is an action of trespass on the case commenced against him in the said Cook County court of common pleas by the city of Chicago, a body corporate established and existing within the county of Cook and State of Illinois under the laws of said State; that your petitioner, the defendant, is not a citizen of the said State of Illinois, but is a citizen of the State of New York; and that the matter in dispute in said suit exceeds the sum of five hundred dollars, exclusive of costs.

Your petitioner therefore prays that the said cause may be removed for trial into the next United States circuit court, to be held in the northern district of Illinois, which court is to be holden on the first Monday in March, A. D. 1858; and he hereby offers to this honorable court good and sufficient security for his entering in said United States circuit court, on the first day of its session, copies of said process against him, and for entering then and there his appearance in said suit according to the act of Congress in
22 such case made and provided. And your petitioner will ever pray, &c.

ALLEN ROBBINS,
By his attorneys, STUART & AYER.

STATE OF ILLINOIS, *Cook County, ss:*

Allen Robbins, the petitioner named in the foregoing petition, being first duly sworn, deposes and says that the facts stated in the foregoing petition are true.

ALLEN ROBBINS.

Subscribed and sworn to by the said Allen Robbins this tenth day of February, A. D. 1858, before me.

WALTER KIMBALL, *Clerk.*

Endorsed: Filed Feb'y 10th, 1858.

W. KIMBALL, *Clk.*

Filed March 1st, 1858.

WM. H. BRADLEY, *Clerk.*

23 D.—*Bond.*

Know all men by these presents that we, Allen Robbins, of the city, county, and State of New York, and David Stuart and Benjamin F. Ayre, both of Chicago, in the county of Cook and State of Illinois, are held and firmly bound unto the city of Chicago, a body corporate and politic established and existing within the county of Cook and State of Illinois under the laws of said State, in the sum of twenty-five thousand dollars, to be paid to the said city of Chicago, to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, firmly by these presents. Sealed with our seals and dated the tenth day of February, A. D. 1858.

The condition of the above obligation is such that whereas the above-named Allen Robbins has filed his petition in the court of common pleas of the county of Cook and State of Illinois, praying for the removal of a certain cause pending in said court, in which the city of Chicago aforesaid is plaintiff and the said Allen Robbins is defendant, for trial into the next
24 United States circuit court, to be held in the northern district of Illinois, according to the act of Congress in such case made and provided: Now if the said Allen Robbins shall enter or cause to be entered in the said United States circuit court on the first day of the next term of said court copies of such process as hath been issued against him in the said Cook County court of common pleas in the action aforesaid, and if he shall enter his appearance in the said suit in the said United States circuit court on the first day of the next term of said court, then this obligation shall be void; otherwise, to be and remain in full force and virtue.

ALLEN ROBBINS. [SEAL.]
DAVID STUART. [SEAL.]
B. F. AYRE. [SEAL.]

Endorsed: Filed Feb'y 11, 1858.

W. KIMBALL, *Clk.*

Filed March 1st, 1858.

WM. H. BRADLEY, *Clerk.*

Record.

25 STATE OF ILLINOIS, *County of Cook, ss:*

Pleas before the Honorable John M. Wilson, judge of the Cook County court of common pleas within and for the county and State aforesaid, at a regular term of said Cook County court of common pleas begun and holden at the court-house in the city of Chicago, in said county and State, on the first Monday, being the first day of February, in the year of our Lord one

thousand eight hundred and fifty-eight, and of the independence of the United States of America the eighty-second.

Present: The Hon. John M. Wilson, judge; Carlos Haven, pros. attorney; John L. Wilson, sheriff.

Attest: WALTER KIMBALL, *Clerk.*

Be it remembered, that on the thirteenth day of February, A. D. eighteen hundred and fifty-eight, said day being one of the days of the February term of the Cook County court of common pleas, in the year afore-
26 said, the following proceedings were had in said court, and entered of record, to wit:

THE CITY OF CHICAGO *vs.* ALLEN ROBBINS. } Trespass on the case.

And now upon this day comes the said defendant, Allen Robbins, by his attorneys, Stuart & Ayer, and files herein his petition, verified by affidavit, stating that he is not a citizen of the State of Illinois, but is a citizen of the State of New York, and prays that this cause may be removed for trial into the United States circuit court in the northern district of Illinois; and said defendant also files herein his bond, with good and sufficient security for his entering in said United States circuit court on the first day of its next session, this cause, and his appearance therein, according to the act of Congress in such case made and provided; and on motion of said defendant's attorneys it is ordered by the court that this cause be, and the same hereby is,
27 transferred to the United States circuit court in the northern district of the State of Illinois for trial.

STATE OF ILLINOIS, *County of Cook, ss:*

I, Walter Kimball, clerk of the Cook County court of common pleas in and for the county and State aforesaid, do hereby certify that the foregoing is a true copy of an order made and entered on the thirteenth day of February last past in said court in the case of the city of Chicago, plaintiff, and Allen Robbins, defendant, and that the papers herewith transferred, marked "A," "B," "C," and "D," are the original and all the papers in said cause.

Certified under my hand and the seal of said court, at the city of Chicago, in said county, this 1st day of March, A. D. 1858.

[SEAL.] WALTER KIMBALL, *Clerk.*

Endorsed: Filed March 1st, 1863.

WM. H. BRADLEY, *Clerk.*

28 On the same day, to wit, the first day of March, A. D. 1858, came the said defendant by his attorneys, and filed in said clerk's office in said entitled cause their plea, which is in the words and figures following, to wit:

United States circuit court for the northern district of Illinois, of the March term, 1858.

ALLEN ROBBINS *ads.* THE CITY OF CHICAGO. }

And the said defendant, by Stuart & Ayre, his attorneys, comes and defends the wrong and injury, when, &c., and says that he is not guilty of the said supposed grievances above laid to his charge, or any or either of them,

or any part thereof, in manner and form as the said plaintiff hath above thereof complained against him. And of this he, the said defendant, puts himself upon the country, &c.

STUART & AYRE,
Attorneys for the Defendant.

And the plaintiff doth the like.

GEORGE F. CROCKER, *Pl'ff's Attorney.*

Endorsed: Filed March 1st, 1858.

WM. H. BRADLEY, *Clerk.*

29 On this day, to wit, the eighth day of October, A. D. 1859, in the October term of said court, A. D. 1859, in the record and proceedings of said court in said entitled cause is the following entry, to wit:

THE CITY OF CHICAGO
vs.
ALLEN ROBBINS. } Trespass.

Now come the parties by their attorneys, and the defendant, by his attorney, withdraws his second plea herein; and upon issue joined thereupon come a jury of good and lawful men, to wit, E. B. Brewster, Warren Nye, Nelson Mason, D. O. B. Adams, F. S. Gardner, William F. Cady, Isaac W. Vanhosen, Charles M. Waterbury, Frederick Tupper, Charles Sisson, D. F. Carpenter, and E. B. Kingsley, who were duly elected, tried, and sworn well and truly to try said issue, and after hearing a part of the evidence, the hour of adjournment having arrived, the further hearing herein is postponed until Monday morning next.

30 And afterwards, to wit, on the tenth day of October, in the October term of said court, A. D. 1859, in the record of the proceedings of said court in said entitled cause is the following entry, to wit:

THE CITY OF CHICAGO
vs.
ALLEN ROBBINS. } Trespass.

Now come again the parties by their attorneys, and now come also the jury who were heretofore empannelled in this cause, and after proceeding in the trial until the hour of adjournment, the further trial is postponed until to-morrow morning.

And afterwards, to wit, on the eleventh day of October, in the October term of said court, A. D. 1859, in the record of the proceedings of said court in said entitled cause is the following entry, to wit:

THE CITY OF CHICAGO
vs.
ALLEN ROBBINS. } Trespass.

Now come the parties by their attorneys, and now come also the jury heretofore empanneled in this cause, and after concluding the evidence and arguments of counsel, the hour of adjournment having arrived, the instructions of the court to the jury are postponed until to-morrow morning.

31 And afterwards, to wit, on the twelfth day of October, in the October term of said court, A. D. 1859, in the record of the proceedings of said court in said entitled cause is the following entry, to wit:

THE CITY OF CHICAGO
vs.
ALLEN ROBBINS. } Trespass.

Now come again the parties by their attorneys, and now come also the jury heretofore empanneled herein, and after receiving instructions from the court, the jury retire to consider of their verdict.

And afterwards, to wit, on the thirteenth day of October, in the October term of said court, A. D. 1859, in the record of the proceedings of said court in said entitled cause is the following entry, to wit:

THE CITY OF CHICAGO
vs.
ALLEN ROBBINS. } Trespass.

The jury herein having been this day returned into court, and reporting that they were unable to agree upon a verdict, it is ordered by the court that they be discharged.

32 And afterwards, to wit, on the sixth day of April, in the March term of said court, A. D. 1860, in the record of the proceedings of said court in said entitled cause is the following entry, to wit:

THE CITY OF CHICAGO
vs.
ALLEN ROBBINS. } Trespass.

Now come the parties by their respective attorneys, and upon issue joined thereupon come a jury of good and lawful men, to wit, John Strean, Samuel Thomas, jr., Chester D. Bartlett, Samuel Waugh, A. J. Cronise, Joseph Gay, Henry L. Tuller, William V. Plum, Isaac Delano, R. Wheeler, J. C. Adams, and S. W. King, who were duly elected, tried, and sworn well and truly to try said issue, and after hearing a part of the evidence, the hour of adjournment having arrived, the further hearing is postponed until to-morrow morning.

And afterwards, to wit, on the seventh day of April, in the March term of said court, A. D. 1860, in the record of the proceedings of said court in said entitled cause is the following entry, to wit:

33 THE CITY OF CHICAGO
vs.
ALLEN ROBBINS. } Trespass.

Now come again the parties by their attorneys, and now come also the jury heretofore empanneled in this cause, and after hearing the concluding evidence and a part of the arguments of counsel, the hour of adjournment having arrived, the further hearing is postponed until Monday morning next.

And afterwards, to wit, on the ninth day of April, in the March term of said court, A. D. 1860, in the record of the proceedings of said court in said entitled cause is the following entry, to wit:

THE CITY OF CHICAGO
vs.
ALLEN ROBBINS. }

Now come again the parties by their attorneys, and now come also the jury heretofore empanneled in this cause, and after hearing the concluding

arguments of counsel and receiving instructions from the court, the
34 jury retire to consider of their verdict, and by agreement of the parties by their attorneys, it is ordered by the court that the jury, when they may have agreed upon a verdict, shall sign and seal the same and deliver the same to the clerk, and disperse and meet the court to-morrow morning.

And afterwards, to wit, on the tenth day of April, in the March term of said court, A. D. 1860, in the record of the proceedings of said court in said entitled cause is the following entry, to wit:

CITY OF CHICAGO
vs. } Trespass.
ALLEN ROBBINS.

Now come again the parties, by their attorneys, and now come also the jury heretofore empanneled in this cause and return into court the following verdict, to wit:

We, the jury, find the defendant not guilty.

Whereupon the plaintiff, by its attorneys, moves the court for a new trial herein.

35 And afterwards, to wit, on the twenty-fourth day of May, in the May term of said court, A. D. 1860, in the record of the proceedings of said court in said entitled cause is the following entry, to wit:

THE CITY OF CHICAGO
vs. } Trespass.
ALLEN ROBBINS.

Now comes on to be heard the motion of the plaintiff heretofore made herein for a new trial of this cause, and after hearing the argument on the part of the plaintiff, the court takes the same under advisement.

And afterwards, to wit, on the twenty-sixth day of May, in the May term of said court, A. D. 1860, in the record of the proceedings of said court in said entitled cause is the following entry, to wit:

THE CITY OF CHICAGO
vs. } Trespass.
ALLEN ROBBINS.

Now comes on again to be heard the motion of the plaintiff for a
36 new trial of this cause, and after hearing the further argument of counsel the court takes time to consider.

And afterwards, to wit, on the twenty-eighth day of May, in the May term of said court, A. D. 1860, in the record of the proceedings of said court in said entitled cause is the following entry, to wit:

THE CITY OF CHICAGO
vs. } Trespass.
ALLEN ROBBINS.

The court having fully considered, and being now fully advised, upon the motion of the plaintiff for a new trial herein, overrules said motion.

It is thereupon considered and adjudged by the court that the defendant have and recover of the plaintiff his costs by him about his defence in this behalf expended, amounting to the sum of twenty-seven dollars and sixty-nine cents, and that he have execution therefor.

37 And afterwards, to wit, on the fourteenth day of July, in the July term of said court, A. D. 1864, in the record of the proceedings of said court in said entitled cause is the following entry, to wit:

THE CITY OF CHICAGO
vs.
ALLEN ROBBINS. } Trespass on the case.

Now came the parties, by their attorneys, and now comes on to be heard the motion of the defendant, by his attorneys, upon affidavit filed for a continuance of this cause, and after arguments of counsel, the court not being sufficiently advised, takes time to consider.

And afterwards, to wit, on the nineteenth day of July, in the July term of said court, A. D. 1864, in the record of the proceedings thereof in said court in said entitled cause is the following entry, to wit:

THE CITY OF CHICAGO
vs.
ALLEN ROBBINS. } Trespass on the case.

38 The court having considered, and being now fully advised, upon the motion of the defendant for a continuance of this cause, overrules the same. And now come the parties, by their attorneys, and upon issued joined thereupon come a jury of good and lawful men, to wit, J. W. Dean, F. A. Leavitt, A. B. Rundal, J. H. McCaslin, E. A. Bennett, William T. Felton, A. P. Wurts, Robert Sheppard, A. J. Hayward, Thomas McNulty, Louis B. Kelley, and D. A. Holmes, who were all duly elected, tried, and sworn to well and truly try said issue, and after hearing a part of the evidence, the hour of adjournment having arrived, the further trial of the cause is postponed until to-morrow morning.

And afterwards, to wit, on the twentieth day of July, in the July term of said court, A. D. 1864, in the record of the proceedings of said court in said entitled cause is the following entry, to wit:

THE CITY OF CHICAGO
vs.
ALLEN ROBBINS. } Trespass on the case.

39 Now come again the parties, by their attorneys, and come also the jury in this behalf empanneled and sworn, and the plaintiff, by its attorneys, moves the court for an attachment against O. J. Rose, a delinquent witness on the part of the plaintiff herein, and it appearing to the court that said O. J. Rose had been duly served with process to appear before this court as such witness, it is ordered by the court that an attachment issue against said O. J. Rose, returnable forthwith, and after hearing additional evidence in this cause until the hour of adjournment, without concluding the same, the further trial is postponed until to-morrow morning.

And afterwards, to wit, on the twenty-first day of July, in the July term of said court, A. D. 1864, in the record of the proceedings of said court in said entitled cause is the following entry, to wit:

THE CITY OF CHICAGO
vs.
ALLEN ROBBINS. } Trespass on the case.

40 Now come again the parties, by their attorneys, and now come also the jury in this behalf empanneled and sworn, and after hearing the concluding evidence, the arguments of counsel, and receiving instructions from the court, the jury retired to consider of their verdict, and after a short absence the jury returned into court the following verdict, to wit:

We, the jury, find the defendant guilty, and assess the plaintiff's damages to the sum of twenty-one thousand five hundred and fifty-one dollars and seven cents.

And thereupon the defendant, by his attorneys, moves the court for a new trial and in arrest of judgment herein.

On this day, to wit, the twenty-first day of July, A. D. 1864, came the said defendant, by his attorneys, and filed in said clerk's office in said entitled cause his bill of exceptions, which is in the words and figures following, to wit:

41 On the trial the following exceptions were made and allowed, to wit:

Circuit court of the United States, northern district of Illinois.

CITY OF CHICAGO
vs.
ALLEN ROBBINS.

Be it known that this case came on to be heard before the Hon. David Davis, presiding judge, and the Hon. Thomas Drummond, associate judge of said court, and that the following evidence and proceedings were had therein, to wit:

Walter Kimball, a witness called by plaintiff, having been duly sworn, was examined, and testified as follows:

Q. Are you deputy clerk of the superior court of Chicago?
A. I am.
Q. That is, the reorganization of the Cook County court of common pleas?
A. Yes, sir.

42 Q. Have you the records of the Cook County court of common pleas in which there are the entries in relation to the suit of William H. Woodbury against the city of Chicago?
A. Yes, sir; I have them here.
Q. Will you produce them?
Q. Turn to the papers and see when the suit of William H. Woodbury against the city of Chicago was commenced?
A. The precept for summons was filed January 22nd, 1857.
Q. The suit was commenced January 22nd, 1857?
A. Yes, sir.
Q. Was there a verdict in that suit?
A. There was.
Q. When was the verdict?
A. The verdict was rendered some time in April, and judgment was rendered in June, 1857. The verdict was rendered on the 18th April, 1857.
Q. What was the amount of the verdict?
A. The sum of fifteen thousand (15,000) dollars damages.
Q. Was that verdict followed by a judgment?

43 A. Yes, sir.
Q. Turn to the judgment.
A. It was followed by a judgment on the 24th day of June, 1857.
Q. For fifteen thousand (15,000) dollars damages and costs of suit?
A. For fifteen thousand (15,000) dollars and costs.
Q. Was an execution issued?
A. Yes, sir.
Q. Is that there?
A. Yes, sir; I have it here.
Q. Give the date of it and the amount of costs.

A. The execution issued 13th July, 1857, against the city of Chicago in favor of William H. Woodbury, in the sum of fifteen thousand (15,000) dollars damages and twenty (20) dollars and fifteen (15) cents costs.

Q. Is the execution returned?

A. Yes, sir. It is returned, "Satisfied in full by the receipt of the plaintiff's attorney herein endorsed, the 20th day of July, 1857. John L. Wilson, sheriff, by George Andrew, deputy."

Q. How much appears to have been paid?

44 Here is the return: "20th July, 1857. The sheriff will return the within execution satisfied in full, L. D. Wilkinson, plaintiff's attorney, and received nine (9) dollars and fifteen (15) cents for plaintiff's costs. L. D. Wilson." That is all the endorsement on it.

Q. In the endorsement of sheriff's fees, here are some pencil marks which I presume are the sheriff's fees.

The court, (Davis, J.) State nothing but what you know.

A. That is all I know.

Q. Were you present at the trial? Were you clerk of the Cook County court of common pleas?

A. Yes, sir; I was at that time.

Q. Were you present at the trial of the cause of the suit of William H. Woodbury against the city of Chicago?

A. Yes, sir.

Q. Can you state for what injury that recovery was had?

A. I know there was a declaration in this case. I have read it myself frequently, at least more than once of twice. I know the trial on which the verdict was rendered was founded on that declaration, which was for damages for injuries sustained in falling down the area of Mr. Robbin's building.

45 Q. That was the claim made?

A. Yes, sir.

Q. And that was the subject-matter of the inquiry in that court?

A. Yes.

By the court, (Drummond, J.) Q. Do you know where is the declaration?

A. I do not. I think it was used once before in the trial, but I think that some of the parties have mislaid it. I have searched for it frequently myself, and other clerks have to find it.

Cross-examination.

Q. When did you first know that that declaration was gone or lost?

A. Well, sir, the declaration, I know from my own remembrance, has been on file in the court of common pleas. I remember distinctly of seeing it before the trial. I remember of having it in my possession several times. I could not state when is the date of its filing, or whether I filed it myself or by a clerk.

Q. When did you first know that declaration was lost?

A. I know there have been several calls for this declaration in this
46 case. I remember two (2) or three (3) times. I have looked for it, and knowing it was from the file, I searched for it and I could not find it. I have the impression that the declaration was in these papers about the time of the trial of this case, in this court, previous to now.

Q. Did you testify on the last trial of this cause in this court?

A. I believe not.

Q. Do you know if the declaration was then present or not?

A. I do not.

Q. Did you hear any complaint about the absence of the declaration from the files at that time?

A. I don't remember, Mr. Fuller, whether I did or not.
Q. How many counts were there in that declaration?
A. I can't say.
Q. What attorney's name was signed to it?
A. Well, I won't be sure whether it was Mr. Wilkinson's name who at that time acted as plaintiff's attorney or not. L. D. Wilkson was the attorney in the case.
Q. In the case of Woodbury against the city?
A. Yes, sir.
47 Q. When did you last read that declaration?
A. I can't state that, sir.
Q. You have been clerk of the courts, under various terms, for several years, have you not?
A. Yes, sir; twelve (12) years.
Q. State what called your attention to that declaration, and induced you to read it.
A. Well, sir, I have read a great many declarations. I read this, I presume, because it was an important case, to see what was set out in it; probably more as a matter of curiosity than anything else.
Q. Do you think you have read it since the trial of the cause in 1857?
A. I presume not.
Q. You are unable to state how many counts there were in the declaration?
A. Yes, sir.
Q. State what damages plaintiff claimed. Can you do so?
A. No, sir; I don't distinctly recollect.
Q. Can you state whether he claimed fifteen thousand (15,000) dollars or more?
48 A. I don't recollect from the declaration.
Q. Did you know Mr. Robbins at that time?
A. Yes, sir.
Q. Will you please describe the premises as stated in the declaration?
A. I don't know that I can particularly say, as it was particularly described in the declaration.
Q. Do you know where they were as stated in the declaration?
A. I don't know as I can state.
Q. Can you tell the time laid in the declaration when Woodbury was injured?
A. Not from the declaration I can't.
Q. Do you remember what was stated in the declaration as to the kind of injury Woodbury sustained?
A. No, sir, not from the declaration.
Q. Can you state what was said in the declaration about the condition of the premises at the time and place that Woodbury was injured?
A. No, sir.
49 Q. Will you please look at the first entry that appears in the record of proceedings in that case? I think you stated the trial was on the 18th of April?
A. Yes, sir.
Q. Will you please read it?
A. The trial did not commence on that day.
Q. When did the trial commence?
A. It commenced on the 17th of April, 1857.
Q. What day was the verdict rendered?
A. On the 18th.
Q. What is the next entry which appears?
A. The overruling of the motion for a new trial.

Q. When was that motion for a new trial entered as appears from that record?

A. On the 18th April.

Q. Read the entry in regard to it?

Witness. For a new trial?

Counsel. Yes.

A. "Thereupon the said defendant enters its motion for a new trial and in arrest of judgment in this cause."

50 Q. Now read the next entry—the next entry following.

A. "In the Cook County court of common pleas of the June term, A. D. 1857. 24th June. 572. William H. Woodbury vs. the city of Chicago, trespass on the case. And now comes the said plaintiff by L. D. Wilkinson, his attorney, and the said defendant, John C. Miller, attorney of the said the city of Chicago, also comes, and on argument of the said counsel of the parties of the motion in arrest of judgment, and for a new trial of this cause heretofore entered herein by the said defendant, the court here being fully advised in the premises, it is ordered that defendant's said motion be overruled; and thereupon the said defendant enters its exceptions to the said ruling of the court. Wherefore it is considered that the said plaintiff do have and recover fifteen thousand (15,000) dollars in form aforesaid by the jury here assessed, and also his costs and charges by him about his suit in this behalf expended, and have execution therefor."

Q. Who was judge of that court at that time?

A. John M. Wilson.

Q. Now living in this city?

A. Yes, sir.

51 Q. Were you present at any argument or any motion for a new trial and in arrest of judgment?

A. I don't remember of any argument or any motion for a new trial in the case. There may have been, but I do not remember it.

Q. Are you able to state from your minutes or recollection whether or not you were in court at the time it was overruled?

A. I presume I was.

Q. Do you know?

A. I know I never missed a day in court.

Q. What attornies were in court? Do you know if Mr. Miller was present?

A. Well, Mr. Miller attended to this case in behalf of the city, and the record shows he was present. I can't personally say that Mr. Miller was present in person from my recollection that day.

Q. Do you recollect whether Mr. Wilkinson was or was not present?

A. No, sir.

Q Then the fact is that you have no exact recollection of the matter except what you find upon your record?

52 A. Yes, sir; I presume I was present, for the minutes upon my docket are in my handwriting.

Q. Is that the last entry that appears on your record?

A. Yes, sir, I believe it is.

Q. Mr. Wilkinson is dead, is he not?

A. I believe he is, sir.

Q. Do you know anything about the payment of any money in satisfaction of this execution?

A. No, sir.

Q. Do you know anything more than the memorandum which appears upon it?

A. No, sir.

Q. Do you know Mr. Wilkinson's handwriting?

A. Yes, sir.

Q. Is this memorandum on the back in his handwriting?

A. That is his signature signed to it.

Q. "The sheriff will return the within execution satisfied in full. L. D. Wilkinson, plaintiff's attorney."

A. Yes, sir.

53 Q. Did the term close and another one begin between the time of the trial of that suit and the entry of judgment? In other words, did the motion for a new trial stand from one term to another?

A. Yes, sir; it stood from April to June; there was a term in April and a term in June.

Q. Was the motion for a new trial and in arrest of judgment entered on the last day of the June term? How does that appear on your record? Does it appear among the general clearing up at the close of the term?

A. No; the term did not close until the last of the month.

Q It did not close until some time after the 29th?

A. The term did not close until July; I think it was a special term.

Q. This is all you know in regard to the payment of money in satisfaction of the judgment, what appears from the memorandum?

A. Yes, sir.

Elliot Anthony, a witness called by plaintiff, being duly sworn, testified as follows:

54 Witness. I would state in regard to this declaration, we have had the declaration in all the trials, and we used it at the last trial. My recollection is in making up your opinion, you had the declaration, and took it from the files for that purpose. When the bill of exceptions came to be made up between Mr. Ayer and myself, then and about that time I discovered the declaration was not in the papers. I called your honor's attention to the point. I think it was early last spring, and if the court will recollect, I called at your room, and then again at the commencement of this term. I have had the declaration repeatedly; we have used it at all the trials. I had in my possession also a copy of it, or nearly a copy of it, which was borrowed by Mr. True and Mr. Gregory for a form, and between these two gentlemen the copy of it has been mislaid and lost. So far as the declaration has been concerned, we have used it at all the trials. It was produced by Mr. Darrow, a deputy in the superior court.

Drummond, J. Did I look at that time for it?

A. My recollection was that you stated to me you had looked but could not find it. My recollection is that at that time you told me you could not find it in your papers. I have looked among my papers.

Q. Will you state, as near as you can recollect, the contents of the declaration?

55 A. My recollection of the declaration was, it was a declaration which was drawn, reciting in the usual form of a declaration of trespass on the case against the city of Chicago on behalf of William H. Woodbury, and L. D. Wilkinson was the attorney of record, and alleged in it of the falling into the area at the corner of Wells and South Water streets, into this open area left unguarded and the injury to him; and my recollection of it is that the damages ad damnus was put at twenty thousand (20,000) or twenty-five thousand (25,000) dollars. That is my recollection of it; we have used the declaration, and read it to the jury on two different occasions, when I have read it myself to the jury.

Q. Locate the place of the injury.

A. It located it distinctly in terms alleging and averring that the property was the property of Allen Robbins, and at the corner of Wells and South Water streets.

Q. Where the injury happened?
A. Where the injury happened, stating that the area was open.
Q. Were you present at the trial of that cause in the superior court?
56 A. I was not present at that time; I had nothing to do with it.
Q. I did not know but you might have been present at the trial.
A. I don't recollect of being present at the trial.
Q. Have you made a search for the declaration among our papers?
A. I have searched through and through among my papers and all the papers I ever used in connection with the case, and I have not been able to find it; I have also had a search made in the superior court.
Q. Did you examine the files of the superior court to endeavor to find it there?
A. I have.
Q. You could not find it?
A. I could not find it.

Cross-examination.

Q. How many counts were in that declaration?
A. I should say there was about three counts; my recollection is there were about three counts; I may be mistaken.
Q. How did it describe the injury to Woodbury? How did it state he was injured?
A. It stated while he was passing along the street.
57 Q. What injury did it state that he sustained?
A. It stated in general terms, my recollection is, that he suffered a severe injury in falling into this open area.
Q. State what the injury was, or did it?
A. I do not think it stated in detail. My recollection is that it did not state in detail wherein the injury consisted.
Q. Did it claim anything on account of expenses for medical attendance?
A. Well, sir, perhaps it did, but I do not recollect distinctly on that point.
Q. Whether it did or not?
A. I do not recollect distinctly.
Q. Did it describe the condition of the place in which it was alleged Woodbury fell?
A. My recollection is it described it as an area left open, unguarded, and unprotected.
Q. Did it particularly describe the size, width, length, and depth of that space?
A. My recollection is on that point that it described it as a large, open area or space. I don't think it stated the number of feet at all.
58 Q. Which side of the building did it state it was?
A. My recollection is that it stated it was at the corner or near the corner of Wells and South Water streets.
Q. On which side?
A. I should say on Wells street.
Q. Two sides of the building would answer that condition?
A. Certainly, sir.
Q. When do you recollect reading that declaration last?
A. I recollect reading it at the last trial which we had here.
Q. When was that—three or four years ago?
A. No, sir; the last trial we had here was in 1862.

Direct resumed.

Q. That declaration is the declaration set forth in this declaration—the averment?

A. Yes, sir, precisely.

Drummond, J. It could not have been in 1862.

A. My recollection is that it was decided in the Supreme Court after going over one year, and the year before that would bring it to 1861.

Mr. Fuller. 1860.

Witness. 1860 or 1861. I know it lay over one year for the Supreme Court.

59 Plaintiff, by its counsel, introduces a stipulation between the parties that the witnesses who were examined on the former trial, and whose presence cannot be procured at this trial, may be offered in evidence by the record, as included in the bill of exceptions heretofore filed in the cause, and further admitting that the place where William H. Woodbury was injured was near the corner of Wells and South Water streets, in the city of Chicago, and that the area into which Woodbury fell was attached to the building owned by Allen Robbins, and was then being erected by him; and further, that plaintiff will not move this cause for trial in the absence of Samuel W. Fuller, esq.

The testimony of M. M. Gillespie, a witness on behalf of plaintiff, which is as follows :

M. M. Gillespie sworn:

Reside in Chicago. Have resided here since February, 1856. In 1856 I was in Gibbs & Griffith's warehouse, on the north side, during the fall and winter. I boarded then at No. 195 Washington street. I had to cross the Wells St. bridge to go to the warehouse. I knew Wm. H. Woodbury. I know the iron building corner of Wells street and Water street. It was erected in summer of 1856. I used to pass there 2, 3, or 4 times a day. I first saw Woodbury on the west side of Wells Street bridge. He was

60 coming across from the north to south side. I was walking 3 or 4 rods behind him, going the same way. It was in December, 1856, in the evening, between 8 and 9 o'clock. It was on Sunday evening. It was cold, and it snowed. He came across on the west side of the bridge, and then crossed over to the southeast corner of Wells and S. Water streets. I saw him going ahead of me. I looked down a moment and he was gone. I last saw him near the corner of the building and going south. I supposed that he had fallen into the area. I ran up to where he was. He hollered for help. I went for a ladder and got him out. The sidewalk was laid with flagstones. They had laid grates across the area between the flagging and building for 18 or 20 feet, level with the sidewalk; a space was open where the grates ended all the way, I think to the end of the building. The excavation was about 8 feet deep—7 or 8, may be more. I got him out on to the sidewalk. He said he felt faint. I went with him along to the corner of Wells and Lake street, when he said he felt better. I offered to go home with him. He said no, he could go alone. I never saw him before. I did see him afterwards two or three times. I saw him at the Tremont House on the day after the trial of his case took place, and saw him again last fall. I saw him at Mr. Wilkinson's office previous to the trial.

61 *Cross-examination.*

I saw him as he went on to the sidewalk. He was facing the storm. Did not see him walk backwards. Could not say whether the lamps on the bridge were lighted, but I think they must have been. There was a lamp on the west side of Wells st., at the corner of the alley. I saw him down in the area. I think if I was looking at it I could see the open area, although if a man did not know about it, it might be difficult to see the hole.

There was some snow on the grates; not much had fallen, and it was blowing about. After he got to the corner he said he felt better and could go home alone. He said he didn't think he was much hurt. I saw him once at Wilkinson's office before the trial. Handbills were put out for those who helped him out. When I first saw him at the office he came to the office. I once saw him in bed at the Tremont House, and at another time sitting up in a chair. I saw him last fall again at the Richmond House. He informed me he was a lawyer. He appeared then to be well.

Plaintiff, by its counsel, introduces stipulation between the parties hereto that in the trial of this cause the testimony of Elias Shipman, as printed in the record of the case as used in the Supreme Court, may be used
62 with the same effect as if he were examined in open court on the trial.

Whereupon the testimony of Elias Shipman, a witness on behalf of plaintiff, as contained in the printed record of the evidence in this cause, in the bill of exceptions therein, was then read in evidence as follows:

63 Elias Shipman sworn:

Resided here in 1856; head clerk in Granger's office; knew R. by sight and the buildings; lived with Granger on north side; passed the premises four times and usually six times a day. The flagging on Wells street was commenced at east end some time in September, may be a little later; it was completed about 1st November, I think on both fronts. The area was usually entirely open until after the grating was all done. Some time after the flagging was done, and before the concrete floor of area was laid, I was present at a conversation between Granger and R., exactly at corner of building NW corner of said building. Granger spoke about the danger of the area being open, that it was dangerous. Don't pretend to speak with accuracy as to the language. Somebody's neck or limb would be broken or paid for. The substance was that R. said "that he would see to it." By direction of Mr. Granger, before this, I wrote him a note and put it in the post office, notifying him of the danger of the area. I recollect Mr. G. and myself picking up plank then and putting it across the end at corner; have pretty distinct recollection of doing it more than once; found them afterwards removed; there used to be gang plank running from sidewalk to build-
64 ing. I don't remember ever seeing the area covered till it was covered by grating. I was not in the city at the time of the accident. I saw the defendant frequently, and presume he was in the city while the building was being built.

Cross-examination.

I have no precise recollection when the flagging was finished. The area had been left open as they finished the flagging all along. It was open till after the accident. Have a recollection of putting it over more than once. Testified before that the area had been left open more or less for a week or two. The conversation must have been late in November. Never heard but the one conversation with G. and Robbins. The notice was sent 2 or 3 weeks before this, perhaps before the flagging was laid. The notice had reference to the whole front, not the area particularly. The area was not covered to my recollection properly. I think very likely there were barriers up part of the time. I have no recollection of putting up barriers after the conversation. I know that barriers are frequently stolen and carried away at night. I think the steps to the area were not finished at time of conversation. Lamps at bridges and lamps at alley, 64 feet from the building.

65 *Re-examination.*

Never knew of any barriers being put up. Think the flagging was not all down when I sent the notice.

66 ——— Granger, a witness called by plaintiff, being duly sworn, testified as follows:

Q. Were you connected with the city government in any capacity in 1856, in December, and previous to that?

A. Yes, sir; I was.

Q. In what capacity, sir?

A. From March, 1856, until March, 1857, I was city superintendent of public works.

Q. Do you know the defendant, Mr. Robbins?

A. I do.

Q. Do you know the building at the corner of Wells and South Water street, in this city?

A. Yes, sir.

Q. Owned by Mr. Robbins?

A. Yes, sir; I do know the building.

Q. Where did you live at that time—in what part of the city?

A. I lived on Indiana street, between Wells and Franklin.

67 Q. How did you go from the southern part of the city to your house—over what bridge?

A. I usually passed over the Wells Street bridge when we had a bridge there.

Q. Were you in the habit of passing this building of Robbins's frequently during the time it was in course of erection?

A. Yes, sir; I was.

Q. How frequently, sir?

A. When the bridge was in order or passable for foot people, I usually passed there four or six times a day.

Q. Did you ever see the defendant about this building during the time it was being erected?

A. I saw him several times while it was being erected.

Q. When was the building in fact erected? During what year?

A. My recollections now are that it was commenced in the spring of 1856, and it was perhaps completed, or nearly so, the next winter.

Q. Do you know whether there was any excavation of any portion of Wells street made during the construction of that building?

A. There was some excavation.

68 Q. Describe to the jury what that excavation was. How extensive was it, and for what purpose?

A. I think there was some taken off from the natural ground all over; under the building, where the walls were situated, I think was excavated a little lower for the foundation stone. In the street from his line out there was a wall erected to what we call the curb wall; there was a wall for the outer portion of the sidewalk to rest upon; also a wall between that and the building called the area wall, I believe. That is the wall that sustains the inner end of the flagging stones.

Q. Had any portion of the street been excavated between those walls?

A. I think there must have been some of the natural earth taken off; that is, the original surface of the earth was a little above the bottom of the area and the bottom of the walls, so that the walls were situated a little below the old surface of the ground.

Q. How deep was the area and how high were the walls that you describe before the flagging was put on? What was the depth of the area and curb walls to the bottom under where the sidewalk was afterwards placed?

A. I don't know precisely, but I should think about seven or eight

69 feet.

Q. Will you just describe to the jury how that was covered between those two walls, and how it was covered or intended to be covered between the inside wall and the building?

A. The covering over the two walls, resting over the two walls, was flagging stone. I should think somewhere about eleven or twelve feet long, laid on as they usually are here in the city, for permanent flagging and sidewalks, half together at the edges resting upon each of these walls. From that to the building was an iron grating filled with glass. I forget the name they give it.

Mr. Fuller. Prysmatic?

Witness. That is it.

Q. I think, you said, sir, that after the flagging was laid there would be a space from the top of the flagging to the bottom of the area of some seven or eight feet?

A. I should think it was somewhere about that, from the top of the flagging to the floor of the area.

Q. I would be seven or eight feet?

A. Seven or eight feet.

Q. What was the space between the inner end of the flagging and
70 the building? How much space was there then uncovered by the flagging intended to be covered in some other way by this iron grating?

A. I don't know as I ever measured it, but I should judge from four (4) to five (5) feet.

Q. How far did it extend? Did that opening extend from the Wells street front of the building along Wells street?

A. It extended the whole length of the building before any portion of it was covered.

Q. Along Wells street?

A. Along Wells street there are one or two places not covered yet; it is stairways down into the basement.

Q. Was the distance from the top of the grating, or any portion of the grating, put in from the corner to the bottom of the area at that point, as great as it was under the sidewalk?

Witness. I don't know that I understand the question precisely.

Q. I ask you from the top of the grating to the bottom of the area under the grating, would the distance be as great?

71 A. Yes, sir, a little greater, inasmuch as the sidewalk had a slope toward the street.

Q. What was the use for which this area covered by the grating was intended? What was the object of leaving that five (5) feet between the building and the inner side of the sidewalk?

A. I understand it to be for letting light and air into the rooms below.

Q. Do you know whether there were vaults under the sidewalk under the flagging?

A. I don't know; but they are generally used for that—vaults for coal and so on.

Q. Do you know if in this building there were vaults under the sidewalk?

A. I don't know.

Q. Were there any means of approach to the vaults if there were vaults, from the portion covered by this grating?

A. There was stairs down.

Q. That was the way to get down?

A. Yes, sir.

Q. Do you know, Mr. Granger, about what time in 1856 this flagging was laid down?

72 A. I have no records by which I would know accurately, but I should

judge the flagging was put on somewhere between the middle of August and the first of October. It might have been later than that.

Q. Can you state the width of the sidewalk, excluding the space between the sidewalk—*i. e.*, the inner edge of the sidewalk—and the building? Can you state the width of the flagging?

A. Not precisely. I think my recollection is that the whole sidewalk and area, and all, is sixteen (16) feet.

Q. That would give about eleven (11) for the flagging?

A. Yes, something like between eleven (11) and twelve (12) feet.

Q. Was the portion of the area between the building and the flagging covered as soon as the flagging was laid down?

A. No, sir.

Q. State the condition in which it was after the flagging was laid down.

A. At first it was open. I think it was after that covered with plank, and then this grating put down.

Q. Did you have any conversation with the defendant with relation
73 to the dangerous character of that opening? If so, state what took place.

A. I did.

Q. When was it, and what took place, and what was the condition of that portion of the area between the inner side of the flagging and the building at the time of the conversation?

A. I don't recollect what time this conversation with him was, but it must have been some time in the fall, and I think after it had become cold weather. I don't know whether there had ever been any cover over it, but it was open or partly open at the time I had this talk with him.

Q. State what took place between you and defendant.

A. I advised him to cover it up, and notified him I considered it dangerous to leave it in the condition that it was and had been before that, and my impression is I directed him how he could do it very cheaply.

Q. Was Mr. Robbins aware at that time of your official position—that you were city superintendent?

A. I think he was.

Q. Did you tell him?

A. I had told him before that. I had several conversations with him relative to the work on the street in front of it.

74 Did you give any notice to Mr. Robbins with regard to the dangerous character of this place as city superintendent?

A. I don't think I said anything about being superintendent at that time.

Q. Did you in giving the notice give it as superintendent?

A. I did. I did give it because I considered it my duty to do so.

Q. As superintendent?

A. Yes.

Q. Do you know in whether, after you directed the manner, or suggested the manner in which this opening might be covered, do you know whether it was covered to any extent?

A. My recollection now is that it was.

Q. Do you know whether that covering was at any time afterwards removed?

A. They had to remove it as they put down the flagging.

Q. The grating?

A. Yes, the grating. The flagging was down.

Q. Can you recollect the substance of any conversation, or the words, if you can, of any conversation between yourself, as city superintendent, and defendant, with relation to the dangerous character of this opening—what you said to him, as near as you can recollect?

75 A. I don't recollect the words now.

Q. If you do not recollect the words, can you give the substance?

A. The substance of what I said to him was that I considered it dangerous if it should be sleety; a person passing rapidly, or a drunken person, might fall in or slip in, and to guard against any accident of that kind, for I thought the city might have damages to pay, or something to that effect; I don't remember the words precisely.

Q. Who was the chief clerk in your office that year?

A. Elias Shipman.

Q. Do you recollect his being present on any occasion when you had a conversation with the defendant, Allen Robbins?

A. I have no distinct recollection of his being present. He very frequently passed with me to the place, as he boarded with me.

Q. He lived in your house?

A. Yes; he boarded in my family.

Q. He was your chief clerk in your office?

A. Yes, sir.

Q. Have you no recollection of anything further taking place be-
76 tween you and Robbins, with the words you used, beyond what you have stated as to what might happen in that hole?

A. Not at that time I don't.

Q. At any time had you any other conversation with him during that fall on the subject of this place?

A. Previously to the flagging being laid down, I can recollect once or twice.

Q. Was it then in a dangerous condition?

A. It was part of the time, while they were erecting the walls, and after they got the walls erected there were people felt disposed to run over on the walls, and when there was a covering planked over, the planks would get removed sometimes, and I think I had a talk with him about the planks several times; but generally when I met him my conversation was relative to the raising of the street and establishing the grade over the bridge.

Q. Do you recollect having any conversation with Mr. Robbins on the subject of this dangerous place, after the flagging was laid, except the one you have spoken of?

A. I have no distinct recollection of any more than one conversation relative to it.

Q. After the flagging was laid?

A. After the flagging was laid.

77 Q. When you told Mr. Robbins that it was dangerous, and that somebody would fall in there, and the city would have to pay, what did Mr. Robbins say in answer?

A. I think his reply was that it was more the contractor's business, but he would speak to him.

Q. It was more the contractor's business, but he would speak to him?

A. Yes, sir, or that it was wholly the contractor's business. That is the substance; I forget the words he used relative to that. My recollection is that it was done soon after that, what I directed him.

Q. It was covered up?

A. Yes, sir.

Q. In the manner you had suggested?

A. Yes, sir.

Q. Had there been any ice on the flagging at the time of this conversation between you and defendant, that directed your attention to the particular danger?

A. I can't recollect distinctly, but my impression is that there had been a little sleet.

Q. Did your official duty call you much to that particular part of the city during that year? Was any work progressing at that point that called
78 you there. If so, state what it was.

A. There was the establishing of the grade for Wells Street bridge at each end, and the building of Wells Street bridge. I was there frequently oftener than at other times, either passing or repassing. I sometimes spent near the day there.

Q. Now at any time after this conversation with Mr. Robbins, when you suggested a mode in which this place should be covered up, and you say you think it was done, did you see it open again or any part of it exposed again?

A. I have no distinct recollection now. I presume I saw it opened, because I saw them putting the grating down; but I have not distinct recollection of seeing it open—dangerously open—after that.

Q. Could the grating be put down without removing the boards, joists, or whatever were then to cover this opening?

A. They had to be removed as they put it down.

Q. Do you recollect at any time of replacing any of the planks that had been removed over that opennig?

A. I recollect replacing planks before the flagging was put down several times as I passed and repassed. It would get moved out of place,
79 and leave a hole open. In a case like that, I invariably rolled the plank back and covered the place up again. Sometimes I carried plank and throwed it on if there was a place open.

Q. What is the depth of the building from Wells street? From South Water street corner it runs to the alley, does it not?

A. Yes, sir.

Q. What is the depth?

A. About a hundred (100) feet, something over that, I think I should judge. I have a paper that I could have ascertained the exact depth from my own survey.

Q. Whatever the depth of the building might be—one hundred (100) feet or upwards from the corner to the rear of the building—did this open area extend the whole way when the boards were not on?

A. These four (4) or five (5) feet between the sidewalk and the building?

Counsel. Yes.

A. That extended the whole length of the building before there was any covering or stairs put on.

80 *Cross-examination.*

Mr. Fuller. Before we proceed with the cross-examination, as he has stated he was city superintendent of public works, we offer the section of the charter which was then in force defining his duties. It is the third (3d) section of chapter ten (10) of the city ordinance, revised edition of 1856.

"SEC. 3. It shall be the further duty of the superintendent to take charge of the ferries and bridges, to give all grades for the planking or paving of streets and alleys, and for the laying down of main drains or sewers, and to make all estimates for excavations or otherwise which may be required in the progress of any public improvement. He shall also have the general supervision of the planking of the streets of the city, and all other public works that are not otherwise specially provided for, and he shall deliver or cause to be delivered all the plank timber, stone, or other materials that may be used or required upon the streets or other public works of the city, the delivery of which is not otherwise provided for.

81 Q. How long have you been acquainted with these premises at the corner of Wells and South Water streets?

A. I have been acquainted with them more or less for twenty-eight (28) years. About twenty-eight years.

Q. Was there a bridge there before the year 1856?

A. Yes, sir; there was.

Q. Was the old one taken down and a new one built that year?

A. Yes, sir; there was.

Q. Did you superintend the erection of that bridge during the year 1856?

A. I did.

Q. What effect had the erection of that bridge upon the grades of South Water and Wells street as they approached it?

A. It had the effect to raise the end abutting upon the river much higher than ever it had been built before. It was the first high bridge that had been built in the city under which the tugs were to pass.

82 Q. Mr. Granger, was there any building standing upon Robbins's lot before that year? Was it not vacant?

A. It had been vacant for some length of time, but I don't remember how long since there had been a building upon it. It had been vacant for some time I know.

Q. In the year 1856?

A. Yes.

Q. Was the natural surface of the soil undisturbed at that time over the lot? There had been no excavation on it before, had there?

A. I think not. I think the original surface was not very much disturbed before.

Q. Was the old sidewalk laid upon the natural surface of the ground, or about that above Wells street?

A. My impression is that it laid upon the ground or nearly so by the alley, but that towards the bridge it had been raised some—a little.

Q. By timbers put under it?

A. By timbers edgeway, and planks and joists.

Q. How did the level of the sidewalk compare with the level of the street?

A. I think the street had been raised somewhat.

Q. Had it been raised more there by digging out along next the

83 sidewalk to throw earth in the middle?

A. I don't recollect distinctly, but I think it had some to approach the bridge.

Q. To approach the old bridge?

A. The old bridge, that was so. I think that it required raising some to approach the bridge this way from the three streets.

Q. How much was the street raised adjoining Robbins's building in order to make a proper approach to the bridge?

Witness. The present grade?

Counsel. Yes. How much did you raise it in the summer of 1856?

A. I don't distinctly recollect. We have the profiles. They are on record. They are in the superintendent's office, or in the commissioners' office now, I presume.

Q. As far as you remember, was it not raised at least eight (8) feet—seven (7) or eight (8) feet—a long there in front of his building?

A. It was raised very nearly the hight that the wall was raised.

Q. The height of the curb wall?

84 A. Nearly the height of the curb wall. The curb wall sat into the original earth some.

Q. About how far from his building did the curb wall stand?

A. Sixteen (16) feet.

Q. How wide is Wells street? Is it eighty (80) feet?

A. I think it is; I think it is eighty (80) feet.

Mr. Fuller, for defendant. In this connection we offer section two (2) of chapter fifty-fifty-three (53) of the ordinances of the city, (edition of 1856,) then in force, which was received and read.

"SEC. 2. Unless a different width shall be specified in the order, sidewalks shall be made by the owners or occupants of the premises of the following widths, to wit: on streets eighty feet and upwards in width, sixteen feet; on streets sixty-six and under eighty feet in width, fourteen feet; on streets fifty feet and under sixty-six feet in width, twelve feet; and on streets less than fifty feet in width, nine feet. Sidewalks shall be built within fifteen days after the first publication of notice in the corporation paper, by the owner or occupant of the premises. The order for a sidewalk may be in the following form, to wit: 'Ordered, that a sidewalk be constructed on the side of street from street to street, in the division, in conformity with the ordinance relative to sidewalks.' If a less width than that specified in the ordinance shall be desired, the width should be expressly stated in the order."

85 Q. For what purpose was that curb or outer wall built? To support the earth in the street?

A. It was for a double purpose. I suppose they are used for that; at all events, to support the earth in the street and to sustain the flagging.

Q. To sustain the outer end of the flagging which might form the sidewalk?

A. Yes, sir.

Q. Were you present when the old sidewalk was taken up and removed?

A. I might have passed there while they were doing it.

Q. Have you any particular recollection about it?

A. No, sir; I don't recollect distinctly. I think it was removed a little at a time. I think they first made a passageway where they passed out with teams when they carried out what they excavated from the surface of the earth.

Q. Was there any more excavation than to remove the natural soil that had remained there undisturbed along the space of the old sidewalk and adjoining the street?

A. I don't know how deep, but there was not a very great depth taken off—perhaps a foot or a foot and a half from the old soil; I don't distinctly recollect.

86 Q. Don't you remember that the surface of the earth was there uneven—up and down—the natural surface?

A. The natural surface had been disturbed to some extent all over there; there was so much driving back and forward that it depressed it in some places.

Q. Rutted it up?

A. Yes, rutted it up; and holes had been dug for certain purposes.

Q. Was that curb wall built up any higher than was necessary to support at a proper grade the earth in the street and the Nicholson pavement that was laid upon it?

A. I think no, as I understand.

Q. Was the curb wall next the earth in the street built any higher than was necessary to support the sidewalk, at a proper level, compared with the pavement in the street?

A. No, sir.

Q. Then you would say the space inside the curb wall between that and the building was no greater or deeper than was made necessary by the wall built to support the earth in the street and the sidewalk?

87 A. No, sir.

Q. Was there much variance between the top of the floor of the

area, and of the vaults under the sidewalk when completed, and the old surface level of the ground? Was not the floor of the vaults and area about as high as the old surface of the ground?

A. Not quite, I think.

Q. Would it vary more than a few inches?

A. I could not say how much. I could have ascertained by looking at the profiles, but my impression is there could not have been a great difference. It might have been a foot.

Q. Do you think it was more than eight (8) inches?

A. My impression is now that it might be a foot or a foot and a half, though it might not be over six (6) or eight (8) inches.

Q. Do you recollect making any change of the grade of Wells street during the progress of the work that season?

A. My recollection now is that there had an ordinance passed by the council establishing the grade for all this portion of the city—the south division—
to a certain extent down south. That grade Mr. Robbins first built
88 his wall to, and when I came to establish the grade for the ascent on
to the bridge, I found that it would probably leave his flagging below where I wanted to raise the grade to; and upon consultation with him, and at my suggestion, he raised his flagging eight inches, occupying the space of the step that there would be from the flagging on to the water table of his building —— taking that space up, and raising the wall eight (8) inches higher.

Q. Do you know what time in the year you made that arrangement with him in that season? Would you think it was about August or September?

A. My impression is now it must have been as early as August, from the time they finished the bridge. We got the bridge passable after that.

Q. At any rate, it was after Mr. Robbins had made the plans for putting up his building according to the old grade?

A. Yes.

Q. Did you not find it necessary to raise all of Wells and South Water streets in front of his building and in that neighborhood, in view of getting a better approach and an easier one to the bridge from what you had in the original place?

89 A. I never had any other plan in regard to ascending the bridge than the one established; but when we came to tear down the old bridge and build the new bridge, in running our levels we found this was necessary to ascend without ascending too steep. We found it necessary to commence ascending from the grade as then established somewhere as far south as the south side of Water street, and the further south we could come the better we could make the approach to the bridge. I felt anxious then, that being an experiment—the building of Wells Street bridge and the approach on to it; I felt anxious to get it as easy an approach as I could, and for that reason Mr. Robbins accommodated me by raising his walls eight (8) inches.

Q. What wall do you refer to—the outer wall supporting the earth in the street?

A. Yes.

Q. How was it raised—by putting on eight inches of stone or by putting on new ones of greater width?

A. I think it was raised by adding on to the top of the wall.

Q. Then I understand you, Mr. Granger, that the curb wall support-
90 ing the earth in the street and the wall dividing the area from the vault were made no higher than was necessary to support the sidewalk in its proper place with reference to the street?

A. No, sir; no higher.

Q. And the grade as established for the approach to the bridge?

A. They were not built high enough at first, until we raised them eight inches.

Q. By your direction?

A. Yes.

Q. Do you remember at what time during that season the Nicholson pavement was laid upon that street?

A. I don't recollect the exact time.

Q. Not the day, but about the month?

A. I think it must have been as late as November, because I think they did not get it completed until the frost drove them up.

Q. Do you know what time the curb wall was built to its present height?

A. It was done before the flagging was put on.

91 Q. Would it not be done before the pavement was laid in the street?

A. Some time before that; the flagging had been laid some long time before the paving was put down.

Q. If I understand this was the condition of things, can you tell when the earth was filled into the street before the pavement was laid upon it—at what time in the season the earth filling was completed?

A. We were filling it along through the latter part of the summer. It was not all filled at one time.

Q. Did you have to raise the filling of both streets—Wells and South Water streets? I mean after you found it necessary to have Mr. Dobbins raise his area wall and curb wall, did you then put on another thickness of earth on the street?

A. No, sir; we ascertained the points to which we intended to fill before the filling got up to them.

Q. Mr. Granger, in the fall when you first spoke to Mr. Robbins about covering the space between the curb wall and the building, that space was then equal in length, was it not, to the building, and in width to the lawful width of the sidewalk, and in depth sufficient to support the sidewalk with reference to the street? That was the condition of things. Was it not such an area or open space round the building existing from filling the street and putting up the building?

A. The area and open space between the building and the curb wall was created by the building up of the walls.

92 Q. And the erection of the building?

A. The erection of the building and the filling of the streets.

Q. That space was intended to be covered and used for a sidewalk, was it not?

A. Yes, sir.

Q. What was the first covering made over that space?

A. The first covering was loose space.

Q. By whose direction was it placed there? Did you give any directions about it?

A. I don't recollect distinctly as I directed him to lay plank. I might have done so. If I did it, I did it by way of suggestion that he would do it by laying plank over the walls.

Q. Until the space was covered there was no sidewalk or means of transit for foot passengers?

A. Not unless to go round the materials lying in front or on the other side.

Q. Do you recollect what time in the season this space was covered with plank and joists then at your own suggestion or of his own motion?

A. Not precisely, but I think in July or in August.

93 Q. Do you recollect if it was or not once covered over before the curb wall was raised eight (8) inches and the covering had to be removed in order to lay the additional height of the wall?

A. I would not be positive. I can't tell distinctly as to that, but my recollection is that the plank were laid on there some time before the correct surveys and determined the height we were to ascend on to the bridge.

Q. Then they had to be removed so as to raise them more?

A. It was not much trouble to remove them; they were loose plank lying on the walk.

Q. I think you stated that the distance from the outer edge of the flagging to the inner edge is about eleven (11) feet?

A. Yes, I think the plank was something over the length, and extended toward the building further.

Q. They were laid crossway of the space beneath?

A. As a general thing, I think they were laying crossways. The planks were put on very irregular.

Q. When you testified in your direct examination, in reply to Mr.
94 Hervey's question, that you called Mr. Robbins's attention to the condition of the plank, and somebody might slip in, did you refer to the covering over this space between the two walls that was covered by this plank, or did you refer to the space next the building called here, by way of distinction, the area?

A. In answer to Mr. Hervey's inquiry, I had reference to both. That is, to one of his questions I had reference to one, and in another question I had reference to the other.

Q. Am I right in understanding that the flagging was laid down all round the building some time in October? I understood you to state that it was your recollection.

A. My impression is that the flagging was laid between the middle of August or the first of October. It must have been something later before it was all down.

Q. To direct your attention to the covering of the area, was any covering put on the area after the flagging was laid before you spoke to Mr. Robbins about covering it?

A. I think it was not all covered. There were planks laying into the doors, but not covered. Planking was laid into the doors as gangways, but it was not covered the whole length of the way.

95 Q. Did you suggest to Mr. Robbins how that area should be covered?

A. I think I did; that is my best recollection.

Q. Was it covered as you suggested?

A. I think it was.

Q. Now, Mr. Granger, did you know, either personally or as hearing it as part of the news of the day, when Woobury was injured? We know the time he was injured, on the evening of the 27th or 28th of December of that year.

A. I heard of it soon after. I think perhaps I might have heard of it the next day. It might have been two or three days after.

Q. How long before Woodbury was injured, or you heard he was injured, was it you spoke to Mr. Robbins about covering the area?

A. I am unable to say how long, but I should think a month or over.

Q. Do you recollect whether or not Mr. Robbins was kept away from these premises during November and December by sickness?

(To which interrogatory plaintiff, by its counsel, objected.)

96 The court, (Davis, J.) I can see no objection to its going in. I don't think it is necessary to prove any notice to Robbins, but of course it is competent to do so. The effect of the evidence must depend on the view the court takes of the law. The form of the question is wrong.

Q. Do you know if Mr. Robbins was round there or not in November or December?

A. I don't recollect of seeing him so late as that, though I might have met him, though I don't remember.

Q. Do you recollect of being round there at the time the grating was being laid over the area?

A. I passed there about every day.

Q. I understood you, on direct examination, to say you did not see it in a dangerous condition after you had spoken to Mr. Robbins about covering it?

A. I said I did not recollect of seeing it in a dangerous condition.

Q. How often did you pass there about those times?

A. I passed every day.

Q. Well, had it been in a dangerous condition, would you not have been likely to have noticed it, as you had before?

A. I think I should.

97 *Direct resumed.*

Q. Mr. Granger, did I understand you that Wells street was raised during that summer some seven (7) or eight (8) feet?

A. At the south line of Mr. Robbins's building it is raised—well, it is raised, I should think, in the middle of Wells street, seven (7) feet.

Q. Above the old grade?

A. No, not above the old grade; above the natural surface.

Q. About how high was the street? What was the difference in the height of the street after it was raised in 1856 and what it had been in 1855?

A. I don't remember what the difference exactly was, but it was several feet.

Q. Whatever it was, the profile will show, will it not?

A. I think the profile will show. We took a survey of it.

Q. The profile will also show the grade of the top of the sidewalk?

A. Yes, sir.

Q. It was your business to give to parties intending to build the proper grade, was it not, as city superintendent?

98 A. No, sir; the ordinance established the grade in the south division. It was only my business, whenever it was necessary, to raise that grade for the purpose of ascending on to a bridge, and for bridge purposes or for any necessary purposes to change that grade.

Q. The grade, then, upon which Mr. Robbins originally built was fixed by an ordinance?

A. He first built the wall up to that grade.

Q. As fixed by ordinance?

A. Yes.

Q. Did you inform him what should be the height of his wall—what the grade was? Did he ask you how high he should build, do you recollect?

A. As I said before, I showed him what grade I wanted to bring opposite of his corner to ascend on to the bridge properly, and comparing it with the other grade, I found that would bring his corner too low, and the surface water would flow on to his sidewalk.

Q. You first told him to build as he did build?

A. No, sir,

Q. Did you not first tell him to build as he originally built?

99 A. I had nothing to do with telling him.

Q. When did he get the original grade?

A. He took that from the ordinance.

Q. Do you know where it was fixed?

A. There is various tables about the city pointing out the points from which we take the levels. There are several of them. He could have taken it from any one; Mr. Van Osdell being the superintendent of his building, he could give him his level himself.

Q. Do you know where he got his level?
A. I do not.
Q. He did not get it from you?
A. I don't remember that he got it from me.
Q. Before these curb walls were built was there a sidewalk on that side of Wells street?
A. Yes, sir,
Q. Laid upon the surface?
A. Laid upon the ground—resting on the ground.
Q. How far was that sidewalk below the sidewalk as fixed, after the flagging was raised? What was the difference between the height of
100 the new sidewalk and the old sidewalk?
A. I should think the south end, next to the alley, near seven (7) feet.
Q. At the north end?
A. Not so much, because the sidewalk had ascended a little there. To get on to the old bridge we had raised the sidewalk somewhat. The old street had been raised somewhat.
Q. Do you know by whom that old sidewalk was removed when this building was commenced?
A. I do not, but I presume by some of Mr. Robbins's contractors.
Q. It was removed for Mr. Robbins's convenience, was it not?
A. Yes, sir.
Q. After the old sidewalk was removed you say there was more or less excavation?
A. There was some taken off.
Q. Do you recollect the fact of the removal of that old sidewalk?
A. I recollect its being removed; it was removed.
Q. Do you remember the fact?
101 A. I don't remember the particular circumstances of its being removed, but I think it was removed by pieces, when they were driving out back and forward. They would open a part of it at a time.
Q. What was the object of removing it?
A. It was for the purpose of getting the found. of those walls down.
Q. Of whose wall?
A. The area wall and the curb wall.
Q. Who built those?
A. Mr. Robbins. The wall of the building also. The wall of the building had to be erected.
Q. When the grade was altered or when you found it was necessary to raise the street a little to give you an easier approach to Wells Street bridge, and your suggestion to Mr. Robbins to raise his wall some eight (8) inches, he did so, did he not?
A. Yes, sir.
Q. That was all done before the flagging was laid?
A. Yes.
Q. This additional piece on the wall was put on before the flagging was put on?
A. Yes.
102 Q. So that all that was done was done before you spoke to Mr. Robbins of the dangerous condition of the area?
A. Yes, sir.

Cross-examination of Granger resumed.

Q. The grade was established by an ordinance?
A. Yes.

Q. But there had been no filling in to come up to that grade?
A. No, sir.
Q. Filling in was one thing and establishing the grade was another at that time?
A. Yes.
Q. Was the street filled up to any grade at all?
Witness. It was in 1856 that we filled to any established grade. There had been considerable filling put in to ascend on to the old bridge. That old bridge was not as high by several feet as the new bridge, consequently it did not require so much filling.
Plaintiff, by his counsel, introduced as evidence ordinance of the city of Chicago establishing grades. (Revised ordinances of 1856, page 230.)
"SECTION 7. *Be it ordained by the common council of the city of Chicago,* That the following shall be the established grades for sidewalks in that portion of the south division of the city of Chicago known as the original town and Port Dearborn addition, bounded by South Water street on the north, Michigan avenue on the east, Madison street on the south, and Market street on the west:
103
"Commencing at the corner of Market and Madison streets, eight and fifty one hundredths feet above the level of the Chicago River, and thence running northerly on Market street to the intersection of Lake street on the same grade, viz., eight and fifty one hundredths feet above the level of Chicago River; and thence northeasterly to the intersection of Franklin and Water streets on the same grade, viz., eight and fifty one hundredths feet; thence rising in grade to the corners of Wells and South Water streets to eight and seventy-five one hundredths feet; and thence rising to the corners of La Salle and South Water streets to nine feet; and thence to the corners of Clark and South Water streets to nine and twenty-five one hundredths feet above the level of Chicago River.
"All of these levels to be considered as above the low-water mark of the Chicago River, as established by the canal trustees in 1847, (which mark is hereby adopted as a standard by the common council,) and the grade to be a straight line drawn from corner to corner of each block, except that the grade of sidewalks in all streets in said district, running east and
104 west, shall be made to rise at the rate of nine inches in a hundred feet from the corner of each block toward its centre, until they intersect each other, except where the difference in height of the established grades at the corner of any block shall be sufficient to give this inclination in one direction, in which case the grade of the sidewalk shall be a straight line drawn from corner to corner of the block."

Joshua L. Marsh, a witness called by plaintiff, being duly sworn, was examined by E. Anthony, esq.

Q. Are you a resident of this city?
A. I am.
Q. How long have you been a resident of Chicago?
A. Nearly twenty-one (21) years.
Q. What was your business in 1856?
A. I was practising law. I was city attorney.
Q. Were you city attorney of this city in 1856?
A. Yes, sir.
Q. Do you recollect the suit of William H. Woodbury commenced against the city of Chicago?
A. I do.

Q. Do you recollect when that suit was commenced?
A. No; I do not distinctly; it was some time during the year.
Q. Was it commenced during the time you were city attorney?
A. It was. That is my present recollection.
105 Q. Are you acquainted with Allen Robbins?
A. I am.
Q. Did you know him in the year 1856?
A. I did.
Q. You were acquainted with him at the time of the commencement of the suit?
A. Yes; I had known him some years.
Q. Did you have anything to do while you were city attorney with that suit?
A. Well, when the suit commenced I made some inquiries with reference to preparing the defence of the case for the purpose of informing myself what the merits of the case were as the attorney of the city.
Q. You say you investigated the suit while you were city attorney?
A. Well, yes; partially, sir.
Q. Did you find out what this suit was about?
A. Well, I don't remember distinctly. I have examined the papers in the case, but I did not make a very thorough examination of the case for the reason that my term of office would expire soon, and I found it would not be tried while I was city attorney, and I would not be re-elected, and I did not thoroughly prepare the defense of the case.
106 Q. Did you ascertain during your examination the nature of the action—what it was brought for?
A. Oh, yes, sir.
Q. What did you ascertain?
A. Well, I found out that it was for an injury which the plaintiff in that action had sustained at a building, which I heard, in making my inquiries, belonged to Mr. Robbins.
Q. What place?
A. My present recollection is that it was that iron front building, corner of Water and Wells street.
Q. Did you at any time after the commencement of the suit call the attention of Mr. Robbins to this case?
A. I called upon Mr. Robbins for the purpose of finding out if he knew anything about the case that would be for the benefit of the city in preparing a defense.
Q. When was that?
A. I don't remember; I think it was very shortly after the suit commenced; but where it was I met Robbins I have entirely forgotten upon that occasion. I remember when I saw him on another occasion.
107 Q. Did he give you at that time any information in regard to it? And if so, what was it?
A. He told me there was a gentleman he had heard of, of the name of John Livingston, who he had heard knew something of the case. I think that Livingston boarded at the same place where Woodbury did about the time he received the injury; that he had heard Mr. Livingston knew some facts about the case, and about Woodbury, that would be of benefit to the city.
Q. At this time did you consult with Mr. Robbins about the case?
A. I don't know that I did particularly. I probably told him there was such a case against the city, and wanted to find out all I could about it, for the purpose of preparing a defense on the part of the city.
Q. This was soon after the commencement of the suit?

A. I think it might have been.

Q. Did you have any other conversation with Robbins about this suit?

A. Not while I was city attorney.

Q. When did you have a further conversation about this suit?

108 A. I think it was the day before the trial of the suit. As I was coming down the stairs of the court-house, I met him at the foot of the stairs, and then remarked to him that the case was about to be tried. That was the same day or the day before the trial. I merely remarked to him that the case was about to be tried or was coming on. I told him when it was coming on, I presume.

Q. What did Mr. Robbins say, if anything, at that time?

A. Well, I don't remember that he made any reply to it.

Q. At the first interview, did you inform him that you were city attorney?

A. I don't remember that I did. I knew Mr. Robbins very well, and I presume I supposed he knew it. I have no recollection on the subject.

Q. He knew you were city attorney?

A. I don't know that he did.

Q. You were well acquainted with him?

A. Yes.

Q. You met him almost daily.

A. I was in the habit of meeting him very often. I don't know that I was just at that time, but I know I had known him a long time and known him intimately.

109 Q. What did Mr. Robbins say at that time in regard to Mr. Livingston, whether he had informed him also as to the case?

A. My present recollection is that what he said Livingston would swear to.

Q. I don't ask that, but if Livingston had told him in regard to this case.

Witness. What Livingston told Mr. Robbins in regard to the case?

Counsel. If he informed you he had also told him of this case.

A. Well, I don't remember.

Mr. Fuller. Let him tell what Mr. Robbins said.

The court, (Davis, J.) That is the proper way.

Witness. Mr. Robbins said Livingston boarded at the same place as Woodbury, at the time or immediately after, and his idea was that Woodbury was shamming; that his injuries were not so great as he pretended they were, and for that reason Livingston would be a good witness for the city in preparing a defence for the case.

Q. At this time you were talking in regard to this suit?

A. Well, I met him; I don't know as I went expressly to see him.

110 I met him in the street or somewhere and spoke to him, and it occurred to me the case was on hand.

Q. At this time you were talking of this suit?

A. Oh, yes, sir.

Q. Did he tell you where he resided?

A. I think he did not know or remember exactly where it was; but something was said about his writing. I think he said he would write and get an exact statement of what he would swear to.

Cross-examination.

Q. When was the first conversation?

A. I don't remember the time. I think it must have been shortly after the suit was commenced.

A. Was it in the Tremont House—in what is called the House of David?

A. I think very likely. I used to see him there.

Q. State whether you called on him to notify him of the suit?

A. I did not. That was not my motive I called on him.

Q. Did Mr. Robbins ever know, so far as you know, in what court the suit was pending?

A. I don't remember that I told him in what court it was. I have no present recollection upon the subject.

111 Q. Did you at any time, in behalf of the city, notify him to defend the suit?

A. No; I never gave him any official notice. I never had any idea of holding Mr. Robbins responsible to the city by giving him any notice. I never talked with him with reference to the case with any such idea as that; my only object in talking to him was to prepare the defence of the case.

Q. From the conversation you had with Mr. Robbins you have stated he told you what the witness Livingston would swear to. State whether that witness was ever applied to in behalf of the city, as far as you know, during your official term.

A. Not to my knowledge. It is some time ago, and I have not any distant recollection of making much effort in the defense of the case; my term of office was about to expire.

Q. It was passed over to your successor?

A. My term was about to expire, and I did not suppose I should be re-elected.

Q. Who was your successor?

A. John C. Miller. I followed the precedent of all old city attor-

112 nies of getting rid of all the business I could and shoving it over to the successor.

Q. Did you at the time when you called upon Mr. Robbins, or upon either of the times, endeavor to create the impression in his mind that he would or could be a party to do anything toward defending the suit of Woodbury against the city of Chicago?

(To which interrogatory plaintiffs, by its counsel, objected. The court sustained the objection, and the defendant, by his counsel, then and there excepted.)

Q. I will ask you if the first conversatien was not a mere social matter rather than in an official capacity?

(To which interrogatory plaintiff, by its counsel, objected.)

The court, (Davis, J.) He has said that.

Peter Dox, a witness called by the plaintiff, being duly sworn, was examined by E. Anthony, esq.

Q. You reside in the city of Chicago?

A. Yes, sir.

Q. How long have you resided here?

A. About ten (10) years.

113 Q. Where did you reside in 1856?

A. On Washington street, between Wells and Franklin.

Q. Do you know M. M. Gillespie?

A. Yes, sir.

Q. Did you know him in 1856?

A. Yes, sir.

Q. Do you recollect the building at the corner of South Water and Wells streets?

A. I do.

Q. That one erected by Mr. Robbins in that year?

A. I recollect the building and its being erected.

Q. Did you have occasion on the 28th day of December, 1856, to pass that building? If so, at what time of day?

A. I passed that building in the afternoon of Sunday, I think the twenty-eighth, (28th.)

Q. Of December?

A. Yes.

Q. Had you occasion to see this building frequently before that time?

A. Well, I noticed it three (3) or four (4) times, three or four days previous to that.

Q. What was the condition of the sidewalk and area at the time when you first noticed it?

A. The area was open at the time I noticed it, and was for several days, I should think.

114 Q. Previous to this?

A. Three (3) or four (4) days certain.

Q. Tell what the condition was on the first time when you noticed it. When was the first time when you noticed this area and sidewalk?

A. The first time I noticed it particularly might have been four (4) or five (5) days previous to this. I was on South Water street and returning home. I came to the corner of Wells street, and turning, I turned a little shorter than common and got very near the area. I remarked then to some one that was a dangerous place.

Mr. Fuller. What you said the counsel did not ask for, but what you saw.

Witness. I then saw it open near the corner of Wells and South Water streets.

Q. How many times prior to the 28th of December, 1856, did you notice this sidewalk, area, and building?

A. I think certainly three (3) or four (4) times.

Q. At these times that you saw it, what was the condition of the sidewalk and area?

A. The sidewalk was all right, but the area was open.

Q. On the 28th December, which I understand you to say was Sun-
115 day, did you pass that building, and, if so, at what time of the day, and who was with you, if anybody? State to the jury all about it.

A. I think I could not state the hour exactly, but I think it was as late as two o'clock or later. Gillespie and I took a walk to the north side, and in going over I noticed this same place open. I remained for a time with him.

Q. Who was with you?

A. M. M. Gillespie; he was boarding with me at the time, and we took quite a walk out north, and when we came back we stopped at a friend's, and I told him I thought I would go home and get home to tea. He said, I want to see a man named Fowler. That is about all I know of it.

Q. Did you go past it again on your return that evening?

A. I returned home on the other side of the street.

Q. Did you notice its condition on your returning home?

A. I couldn't very well. I didn't pay no attention.

Q. At the time when you went over on Sunday afternoon with Gillespie, will you be kind enough to tell the jury how you found it?

116 A. I found it open just as I had two (2) or three (3) times previous.

Q. About how much of it?

A. I only noticed the end toward South Water street; it might have been twenty (20) or thirty (30) feet. There was a most dangerous place. It started me once.

Q. About how many feet did you find open?

A. I could not tell.

Q. About how near?

A. It might have been twenty (20) and it might have been forty (40.) There was twenty (20) feet certain, and there might have been forty (40,) but my main attention was called to the corner and near the corner.

Q. About what time did you put it when you went over there with Gillespie?

A. It might have been as late as three (3) o'clock, but I can't say now to any hour.

Q. Do you recollect, or do you know from any particular circumstance, that it was not later than you have stated?

A. I know it was after we had our dinner, and we were home some little time before we went over.

117 Q. Was it not as late as four (4) o'clock?

A. I could not say to an hour.

Q. You think it was about three (3) o'clock?

A. I think it was about that. I could not tell, it was so long ago.

Cross-examination.

Q. How long have you lived in the city?

A. About ten years, sir.

Q. What is your business?

A. I am now at this present time in no business in particular—no particular business. I am employed by the month.

Q. What was your business before you got out of business?

A. I was in the plumbing business, the last business.

Q. How long?

A. Three (3) or four (4) years.

Q. Back to what date was it you left the plumbing business?

A. It is about two years and a half ago.

Q. Do you remember the month?

A. I don't exactly.

Q. What was your business before that?

A. Well, I was keeping boarding-house in 1856. I kept a boarding-house for two years.

118 Q. Where did you keep it?

A. On Washington—South Washington. I mean on East Washington.

Q. In this direction?

A. Between Wells and Franklin.

Q. Did you go along past the building on the southwest corner of South Water and Wells street frequently?

A. I passed over there every day or two.

Q. I understand you, all around the corner of Wells street this sidewalk was covered?

A. Not round the corner.

Q. Near the corner from twenty (20) to forty (40) feet?

A. The length I only guess at.

Q. The space was all of the sidewalk?

A. No, sir; only the area.

Q. How was it covered on South Water street?

A. On South Water street I did not pay much attention to it.

Q. You did not walk so much on South Water street?

A. I only passed there once to notice it, and then I turned the

119 corner.

Q. Do you recollect how the corner was? What covered the space to the building?

A. I think it was flagging, but I would not be positive.

Q. Did the flagging extend away from the outside of the street, clear to the flagging at the corner?

A. I could not really tell you now how it was covered. I think right at the corner was covered, from the fact that I turned on the corner.

Q. Do you know what work was being done at that time?
A. No. I do not.
Q. Do you know if the front walls were on?
A. I think they were.
Q. How was it on the north?
A. I think all the walls were up.
Q. The whole of the walls of the building?
A. I think they were.
Q. When did you first communicate this knowledge that you passed along this street? I will ask you first, did you ever testify in this case before?
A. I was a witness, yes, sir, in the Woodbury case.
Q. Were you in this case?
120 A. Not that I know of.
Q. You were one of the witnesses in the Woodbury case?
A. Yes, sir; I was in that case.
Q. Who subpœnaed you in the Woodbury case? Which side were you called in for, Woodbury or the city?
A. For Woodbury.
Q. Did you apply in accordance with Woodbury's advertisement?
A. No, sir; he learned the fact.
Q. I did not ask you how he learned the fact. That is immaterial in this suit. When were you first spoken to about testifying in this suit?
A. There was a lawyer came to me; I will think of his name in a moment; Lawyer Wilkinson came to me.
Q. Did he ask you to testify in this suit?
A. No, sir, not in this suit.
Q. I ask you who applied to you in this suit for you to testify?
A. I think Mr. Adams is the first man that spoke to me.
121 Q. Did you communicate to him the fact that you knew about this matter, or did he come to you?
A. No; he spoke to me; he asked me if I was a witness in the Woodbury case; I told him I was; he asked me what I knew about it.
Q. How long ago was that?
A. I couldn't say; I think probably a week or ten days.
Q. Have you had your attention called to this matter since you testified in the Woodbury case seven (7) or eight (8) years ago to the present time by anybody? If so, by whom?
A. I don't recollect of talking with anybody in regard to it, unless it was Gillespie and me; he was with me a great deal, and we might have talked it over; no other person that I know of.
Q. Where do you live now?
A. I am now in the city; Bridewell; assistant keeper.

Ellis S. Chesbrough, a witness called by plaintiff, being duly sworn, was examined by E. Anthony, esq.

Q. What is your business?
A. I am city engineer, sir.
Q. How long have you resided in this city?
122 A. Near nine years.
Q. How long have you been city engineer?
A. Since the new charter; I could not tell you how long; that created the office; the revision of the new charter.
Q. Were you connected with the city in any capacity in 1856 and 1857?
A. I was chief engineer of the sewerage board.
Q. Have you any means of showing to the court and jury what the height of the street at the corner of South Water and Wells street is or was in 1856 above low-water mark of the city?

A. I have a plan here which was prepared under the direction of the sewerage commissioners.

Q. Will you take that plan, and from it, if you can, state to the court and jury what the height was of the street?

Q. Was this made under your direction?

A. No, sir, not entirely; it was commenced before I came out here, in 1855, and used afterwards by myself and others in connection with the work.

Q. In connection with the sewerage?

A. Yes, and general drainage.

123 Q. Did you use and do you use this map in fixing the grade of sewers?

A. Yes, sir; it was prepared for that purpose.

Counsel. I will take the first above the Chicago River. Give, if you please, the actual surface of the soil.

A. These plans which I have shows the actual height of the street in 1855, without reference, as I understand it, to any grade, but as the street was at that time. That height above low water in 1857 I understand to be five (5) feet eight (8) and a half ($\frac{1}{2}$) inches to where the point was taken.

Q. You speak of the corner of South Water and Wells streets?

A. I understand it to mean the centre of the intersection of the two streets.

Q. Would it be the same on Wells street, say at South Water street? My point is, was there any difference in regard to the height of the soil above the river on Wells street to what it was in South Water?

A. Yes, there was.

Counsel. That is what I want.

124 A. I give it to you from the plan. The difference was about six (6) inches between South Water street and the middle of the block, between that and Lake. It was nearly seven (7) inches higher in Lake street, and in Wells it was about (9) inches higher.

Q. How high was Wells street above the Chicago River—above the low-water mark?

A. These marks are intended to apply to what is called the low water of 1847. That is what is generally referred to here as low-water. Well, the first mark I gave you was (5) feet; it is down five and seventy-two hundredths (5.72;) that is a little over five (5) feet eight and a half ($8\frac{1}{2}$) inches, the intermediate point.

Q. That is at the intersection of Wells and South Water streets?

A. The centre of the intersection.

Q. Can you give what the height would be in the middle of the block between South Water and Lake streets?

A. Six and twenty-nine hundredths, (6.29;) that is, six (6) feet three (3) and a half ($\frac{1}{2}$) inches.

Q. What is it at Lake?

A. Six and fifty-seven hundredths, (6.57.)

Cross-examination.

125 Q. When did you first come to this city?

A. I came here to remain in October, 1855.

Q. Did you ever verify any of these measurements?

A. Not by my own personal levelling.

Q. You know nothing more about it than what you find delineated on the map?

A. No, sir.

Q. Do you know, Mr. Chesbrough, of your own knowledge, how much the grade of Wells street was raised in 1856 above the old level of the street or the natural surface of the soil?

A. I merely remember that it was raised, but I could not tell you how much.

Q. Do you remember how high the present sidewalk is?

A. I have no means of telling how high the present sidewalk is above the old sidewalk.

Q. You have no means of telling how high the present sidewalk is above the old sidewalk, laid on the surface of the ground?

A. No, sir.

Q. Are those measurements there at the intersection of the centre line of Wells and South Water streets taken at the surface of the street
126 on the approach to the bridge, or is it the height of the natural surface of the soil before it was filled at all, to give access to the bridge?

A. I do not understand it to be in either case. In 1855 the bridge, as they called it there, was one of the floating kind; the approach was not as it at is present; it was not suited to the passage of tugs underneath; therefore there was no approach as there is at present at Wells or Clark streets.

Q. It had been filled in somewhat, had it not?

A. That is my impression, but I was not here when it was done; it was no doubt done before I came.

Q. Do you know of any maps in the city offices which show how much Wells street was raised above the natural surface of the ground in those times, or that purport to show it?

A. There are some maps in the court-room at this time which have reference to that.

Q. Do you know of their correctness, to your knowledge, from having verified them?

A. No, I have not verified them personally; I was going to say that this work is done by assistants of mine, and I take it for granted their
127 work is correct; I did not think it necessary to verify it personally.

Direct resumed.

Q. You take this map and use it for the fixed grades of the sewers in the south division?

A. It was intended for that purpose.

Q. Did you use it for that purpose?

A. Yes; I have used this map for the whole city.

Q. You treat it as an official map?

A. Yes; it has been used more perhaps than any other plan in the office.

Q. You speak of the low-water mark at what it was in 1847. I want to ask you if that corresponds with the level of the Chicago River?

A. Well, the Chicago River, the height of water depends on the height of the water in the lake; ordinarily the river and the lake are on a level, except in time of a freshet, and then, of course, there is a difference.

Q. Do you know whether the grades of the south division were fixed in accordance with its establishment from low-water mark?

A. The ordinance states that fact, that they refer to low-water mark.

128 Q. Then it refers to the same figures you have referred to in that map?

A. These figures refer to the same base or data, as we call it.

Cross-examination resumed.

Q. How high is the present grade of Wells street above this line?

A. Now, I have read it a good many times in the ordinance, but I could not state it positively. I should not like to. I think it is eleven (11) and a half ($\frac{1}{2}$) feet, or in that neighborhood, but I am not sure.

Q. Did you say eleven (11) and a half ($\frac{1}{2}$?)

A. I say I should give that as an impression if anybody was to ask me; but the ordinance will show.

A. M. Hirsch, a witness called by the plaintiff, being duly sworn, was examined, and testified as follows:

Q. You reside in Chicago?

A. Yes, sir.

Q. How long have you resided here?

A. Since 1853. Since July, 1853.

Q. What is your business?

A. My business is engineer—civil engineer.

Q. Where were you in the years 1856 and 1857?

A. I was in the employ of the city of Chicago.

129 Q. Did you hear the testimony of Mr. Chesbrough?

A. Yes, sir.

Q. Have you got any maps or means of showing to the court and jury here how much of Wells street, near the corner of South Water street—how much that street was raised above the natural soil or above the sidewalk?

A. I could not say how much it was raised above the sidewalk, but I could say how much it was. I can give the height of the same with reference to low-water mark, which is the base.

Q. State to the court and jury how high it was.

A. The centre of the intersection of South Water and Wells street is eleven and eight hundredths (11.08) above the city base.

Q. Above low-water mark?

A. Above low-water mark, which is the same as city base.

Q. How high is it in the centre of the block on Wells street, between Lake and South Water? Can you give that?

Witness. That I have to take from another plat.

Q. Never mind then. Can you show from that how much that street was raised, in the year 1856, above the natural soil there?

130 A. It was raised at the same place heretofore mentioned by me about two and nine tenths (2 9-10) feet.

Q. How much was it raised in the centre of the block?

A. That I could not tell.

Q. Have you got a profile here of Wells street?

A. Yes.

Q. I will ask you if you made these maps?

A. Yes, I did.

Q. Will you show what the height of Wells street was?

A. I said two (2) feet nine tenths (10ths.) I have reference to the time of my taking the level. There has been filling done before that time.

Q. When did you take that level?

A. It was shortly before we commenced paving.

Q. When was that?

A. It may have been. I am not positive, without referring to my field-books. I would not be positive if it was in August or July.

Q. Of 1856?

A. 1856.

Q. Give to the jury that height, then.

A. I have here the height on the north side of South Water street, through the centre of Wells street, at three and a half (3½) feet.

131 Q. Above?

A. That is the filling, or rather the height is twelve (12) feet and thirty hundredths (30-100) at the north side of South Water street, through the centre of Wells.

Q. Above the Chicago River?

A. All these figures have reference to the city base.

Q. Give it to us on Wells street.

A. That is what I have reference to; through the centre of Wells street, between the south line of South Water street and the north line.

Q. How many feet was that?

A. Twelve (12) feet and thirty hundredths (30-100.)

Q. Was the height of the surface of the ground twelve (12) feet above the low-water mark?

A. Above the low-water mark.

Q. Can you tell the jury from that map how much the street was raised above that after you took your level in July or August of 1856?

A. Well, I could by this, because this shows the line.

Q. That is just what I want. Tell the jury how much it was raised after you had taken your level in July or August, 1856.

132 A. It was not raised hardly any.

Q. Tell, if you can, the number of feet.

Witness. To bring it to grade?

Counsel. Yes.

A. It was hardly raised any, because at that time the filling of it was almost completed.

Q. About how many feet or inches was it raised?

A. At that time there was not hardly any filling.

Q. After you took this, then, it was not filled up hardly any?

A. No.

Q. Then it did not require, to bring it up to grade, to be filled up?

A. No; not at that time; that is, not according to the city ordinance, but that is a different thing. The grade was changed to accommodate the approach to the bridge.

Q. I am speaking to bring it up to the grade established by the city ordinance.

A juror. He is already speaking of the established city grade, and he speaks of not much additional being put in.

Witness. That is what I stated before; two (2) feet and nine tenths (9-10.)

Mr. Anthony. I am taking his measurement in July or August, 1856,

133 and I want to see if that street was filled up any after that to fill it to grade.

Witness. I said before it was filled from the grade, between the original grade of the city and the grade afterwards altered for the purpose of accommodating of the bridge. It was two (2) feet and nine tenths.

Q. What I am speaking of is how much it required to be filled to bring it to the grade established by the city.

A. The grade established by the city was eight (8) feet and seventy-five hundredths (75-100.) That is the original grade; not the grade that was afterwards established and filled to. The grade that was altered was nine (9) feet and sixty-eight hundredths (68-100.)

Q. When was that altered?

A. At the time when this street was to be paved.

Q. At what time that year?

A. It was paved during the months of August, September, and October.

Q. Exactly. It was fixed and filled up before they put the Nicholson pavement on it?

A. Yes.

134 Q. They put the Nicholson pavement on it in August, September, and October?

A. The Nicholson pavement I had nothing to do with.

Q. I ask you, as a matter of fact, if you do not know they put the Nicholson pavement during that time?

A. Yes.

Q. It was put on after it was up to grade?

A. Yes.

Q. Then it had been filled in before or at the time you took this?

A. It was filled in before.

Q. Before you took these measurements?

A. The grade had been filled in; yes.

Q. You state an alteration took place?

A. Yes.

Q. When did the alteration take place in the grade of Mr. Robbins's sidewalk, if you know?

A. It was in about the month of August.

Cross-examined.

Q. When was the filling before you made these measurements and took these levels?

A. Well, at the time, the filling must have been in before the month of July.

Q. Don't you know all the time they were putting in dirt and filling

135 in this street?

A. Yes.

Q. How much from the original surface of the ground was the street filled up by putting in dirt in the spring, to the time when you took your level?

A. That I did not pay much attention to.

Q. Have you any minute or memorandum by which you can find out how much the street had been raised to the point it was when you took the level?

A. No, I have not.

Q. May it not have been raised five (five) feet for anything you know to the contrary?

A. The figure I gave is only as to the bridge approach.

Q. Yes; but I want to know how much the street had been raised to the time when you commenced to take the level.

A. That I don't know.

Q. Might it not have been raised up as much as four (4) or five (5) feet before you took the level, in which you say two (2) feet a nd nine tenths (9-10) were added?

136 A. May be and may be not. I don't know.

Q. Have you any figures to show how much it was raised?

A. No.

Q. Have you any maps you made which will show how much the street had been raised from the natural surface of the ground to the place it was when you made your level?

A. I don't recollect that I have. If I had been prepared for it I might have been prepared with more data to satisfy you.

By a juror: Q. Does your maps show how much was filled in from the first grade of old Wells street to the last grade?

A. My maps show only the height with reference to low-water mark, and by taking the statement of Mr. Chesbrough, whose figures have also refer-

ence to the city base, and then deducting one from the other, you may answer the question easily.

Cross-examination continued.

Q. Is there not a difference between the grade and the ground as it was?

A. Of course.

Q. For the sake of being clear, you have to take off the difference between the ground as it was and the grade as it was?

137 A. All those figures I gave have no reference to the grade.

Q. Let me ask you, suppose your grade is fixed six (6) feet from the base, it does not follow the ground has been brought to the grade, does it? I mean in old times, as they were several years ago.

A. If I mean sidewalk, I could state the sidewalk, but when I speak of grade I mean the surface of the street.

Q. When you took the measurements, sir, it was with reference to the grade established by the common council?

A. Yes.

Q. The ground was not brought up to that grade?

A. That may be through a misunderstanding.

Counsel. I want you to explain to the jury.

A. When I speak of figures I give you the figures without reference to the grade.

Q. You could tell me what the grade was if there had been no filling in whatever?

A. Yes.

Q. What we want to get at is, how much had been filled in.

A. I can tell you with the aid of what Mr. Chesbrough has stated. I think he stated five (5) feet seventy-two hundredths (72-100) was the surface of the ground.

138 Q. Taking that for granted, how much was the filling?

A. The surface of the ground was eleven (11) feet and eight tenths at the time I took the level in the same place.

Q. You subtract five (5) feet and seventy-two hundredths (72-100) from that, and that will give you the difference?

A. Yes.

Q. So that between five or six feet had been added?

A. Not in that place.

Q. You say it is eleven (11) and eight tenths (8-10)?

A. Yes, at the time I took it, but that was the highest point. There was no necessity to add anything there.

Q. That was the centre of the intersection?

A. That was the centre of the intersection.

Q. If the original ground was only five (5) feet above low-water mark, and if you take that from eleven, (11,) that will show what the raising was?

A. I will give you a little more satisfaction.

Q. Suppose you attend to my question and see if you can't give me satisfaction under that. You say that was eleven (11) and eight tenths (8-10.) You say the original face of the ground was five (5) feet. If you take five (5) from eleven (11,) won't that show how much the raising had been from the surface of the ground to the time you took the level?

139 A. That would show, of course, at that special place.

Q. We will confine ourselves to the special place, as you understand that. How much would that be?

A. That would be five (5) feet four and a quarter ($4\frac{1}{4}$) inches.

Q. Did you say it was raised two (2) feet and nine tenths (9-10) more after?

A. No.

Q. How much since this has it ever been raised?
A. It was never raised any higher at that point.
Q. So that would give five (5) feet and some odd inches it had been raised?
A. Yes.
Q. From the original surface of the ground?
A. Yes.
Q. At the point of intersection of these two streets, running across each other, was not the ground originally at that point higher than it was at a point some five (5) rods south of there?
A. Yes.
Q. So that there would not necessarily be so much raising in the centre of the intersection of the two streets as at a point twenty (20) or thirty (30) feet south on Wells street?
A. No, of course.

David L. Delyolyer, a witness called by plaintiff, being duly sworn,
140 was examined, and testifies as follows:

Q. What is your business?
A. My business has been a contractor in this city for paving.
Q. Upon public improvements?
A. Yes, sir.
Q. Of this city?
A. Yes, since 1855.
Q. Were you following that business in 1856?
A. I was.
Q. Did you at that time know the corner of South Water and Wells streets?
A. I did, sir.
Q. In the city of Chicago?
A. I did.
Q. Did you know the building erected by Mr. Robbins?
A. I did and do.
Q. Did you know the condition of the sidewalk and area in Wells street in the month of December, 1856, and up to that time? If so, state to the jury.
A. In the fall of 1856 I paved South Water street from Franklin street to the east line of Clark, and in paving I paved over the intersection of Wells and South Water, and Mr. Robbins's building at that time—at the time I was paving across there—was then being erected, but I am not positive
141 whether there was one (1) or two (2) or three (3) stories up at that time. It was in the course of erection, at any rate. There was at least one story up at that time. It might have been about the first of November or the latter part of October that I paved. I could tell more particularly if I looked at my books that I crossed that intersection, and there was Mr. Robbins at that time. I am not certain whether he had his sidewalk and flagging laid or not. I am not positive but he had his flagging laid before I got through the job.
Q. The flagging?
A. The flagging of the sidewalk and the flagging was about. It was then eleven (11) feet, and it left an area between the flagging and the building of some four (4) or five (5) feet. The sidewalk was sixteen (16) feet. Well that according to the best of my recollection. When I had finished, which was about the first of December, to Clark street, that area was still open. It was not closed at that time.
Q. Do you recollect it toward the latter part of December?
A. I can't be positive at what time that was closed, but there is one thing I do recollect, that I thought it was very strange that that should be open so long. It was an unnecessary delay at that time after the sidewalk was done.

Cross-examination.

142 Q. Do you recollect anything about the actual condition of this from after the first of December?

A. Well, I think it was after the first of December, some time after that time. I am quite positive that that area that I spoke of between four (4) or five (5) feet; I am not certain which. It was open after the first of December. How long I am not positive.

Q. Are you speaking of Wells or South Water street, or both?

A. I am speaking of the building at the intersection or the sidewalk on the corner of South Water and Wells streets.

Q. The area is on both sides of the building, the west and north fronts?

A. Yes.

Q. Did you pave Wells street?

A. No, sir.

Q. Who did?

A. Mr. Greeley.

Q. When you noticed the area open, was it on the north or west side of the building?

A. My impression is that it was on the west side of the building.

Q. Are you able to fix any time after the first of December that you noticed its condition?

A. I cannot fix any time.

Q. Do you think it was a week?

143 A. I could not be positive; it might have been a week; it might have been two weeks.

Q. Either more or less. I am only asking you to fix the nearest time you can in your recollection.

A. Well, my recollection of it according to my books.

Counsel. Tell us right here now.

A. I am stating now that I finished that pavement at Lake street about the first of December. I finished the paving, and it was not probably three (3) days either way, and it was after that I noticed that this area was still open. How long after that I can't tell.

Q. Fix the time as best you can.

A. I say it might have been a week and it might have been two weeks. I can't say positively.

Q. What do you think?

A. I can't say more than what I have said.

Whereupon the court adjourned until ten (10) o'clock in the forenoon of Wednesday, July 19th, 1864.

Samuel D. Ward, a witness called by plaintiff, being duly sworn, was examined, and testified as follows:

Q. Were you the city comptroller in 1857?

A. From March 20th, 1857, yes, sir.

Q. Who was mayor of the city at that time?

144 A. John Wentworth.

Q. You as comptroller were the financial officer of the city, I believe?

A. Yes, sir.

Q. Have you any knowledge of the payment of a judgment recovered by one William H. Woodbury against the city of Chicago, on this execution?

A. I paid such a judgment.

Q. Is that the amount that you paid?

A. This is the amount that I paid. The amount of the judgment, costs, and interest, fifteen thousand one hundred and ninety-five dollars and ninety-four cents, ($15,195 94.)

Q. Did that include sheriff's fees?

A. Yes, in that included the sheriff's fees.

Q. That was paid to you as financial agent to the sheriff?

A. Yes, sir.

Q. What date, if you recollect?

A. I don't recollect without referring to the records of the office.

Q. Was it shortly after the issuing of the execution?

A. It was. It was at the presentation of the execution by the deputy sheriff at the office.

Cross-examination.

Q. How was it paid?

A. Part of it was paid by bonds, and part of it in an order on the
145 treasury, payable at the time. Fifteen thousand (15,000) of it I think was paid in bonds.

Q. By city bonds?

A. Yes, sir; drawing interest at ten per centum, and the odd hundred and ninety-four or ninety-five I think was paid by an order on the treasury, payable at the time.

Q. To whom was the payment made?

A. It was given to Deputy Sheriff George Anderson, who was the officer who served the execution.

Q. Did you ever hear anything of the judgment or know anything of the circumstances under which it was recovered?

A. Yes. I was familiar at the time the trial was going on of the circumstances.

Q. Do you know whether the city ever made any settlement or arrangement with the plaintiff in the execution or judgment, with respect of the amount recovered?

A. No settlement was ever made except to pay the execution.

Q. So far as you know?

A. So far as I know. If the city had made any settlement, I should have known of it.

Counsel. I did not ask you what you would have known.

Witness. I would have known it, as financial officer, if any arrange-
146 ment or payment had been made.

Alexander Wolcott a witness called by plaintiff, being duly sworn, was examined by R. Hervey, esq.

Q. You have been a resident of this city for a number of years?

A. Yes, sir.

Q. You have been county surveyor?

A. Yes, sir; I am now.

Q. Were you a resident of the city in 1856?

A. Yes, sir.

Q. Where did you reside at that time?

A. I resided on Superior street, on the north side.

Q. Where was your place of business?

A. In the court-house.

Q. Do you recollect the erection of an iron building on the corner of Wells and South Water streets during that year, by Mr. Robbins?

A. Yes, sir.

Q. State whether you passed that building frequently that year, on your way to and from your home.

A. When I was in the city my business called me in the county a good deal, but when I was in the city I passed there from two to four times a day.

Q. State whether you have heard of this accident happening in the area of that building.

A. Yes, sir; I heard of it next morning.

Q. To this man Woodbury?

A. Yes.

147 Q. State whether you saw the condition in which the area adjoining the building was shortly before the happening of this accident.

A. Well, I should think there was some thirty or forty—thirty—feet of that area open but a day or two before that accident. I can't remember when that accident was, but it was shortly before or after Christmas of that year.

Q. You recollect hearing of the accident next morning?

A. Yes, the next morning.

Q. How recently before the accident had you seen this area?

A. Well, I think the day before.

Q. Do you recollect what day of the week the accident happened on?

A. I was on Sunday. I recollect that.

Q. And you think it was Saturday before that you saw it?

A. It was within one or two days, but I think it was the day before.

Q. State to the jury what the condition of the Wells street side of that area was the day before.

A. I should think there was about thirty feet of it left uncovered, without any grating or cover for it.

Q. Was that the space where the grating was expected to be put in?

A. Yes. It was between the flagging and the sidewalk.

148 Q. Had you seen it open at any previous time?

A. It was always open there whenever I went by.

Q. I want to know if you had remarked this opening at any time previous to that.

A. It was open all the time they were at work there.

Q. Had you been in the habit of passing there frequently?

A. Yes.

Q. Every day for some time before the accident?

A. Yes.

Q. What was the condition of the area on the Wells street side at that time?

A. Part of it was open; I should think about thirty feet.

Q. On the Wells street side?

A. Yes, sir.

Cross-examination by F. H. Kales, esq.

Q. Are you now in the employ of the city?

A. The county; I am county surveyor.

Q. Were you in the employ of the city at the time of the accident?

A. No; I was county surveyor at that time.

Q. Did you observe at any time when passing along that this area was covered in anywhere?

A. I think some portion of the time it was covered with boards, that there were boards placed over the area, and there was a railing made of boards

round it part of the time; but the greater portion of the time there
149 was nothing over the area at all.

Q. Are you able to fix the time before the accident that you observed the opening?

A. No; I could not definitely, it is so long ago.

Q. You merely know that occasionally in passing you saw it open from twenty to thirty feet?

A. Yes, sir.

By Mr. Hervey: Q. I forgot to ask you if you ever had any conversation with the defendant, Allen Robbins, on the subject of this dangerous place.

A. No, sir; not on the subject of that dangerous place at all. No, nothing only about the grade, that is all.

John M. Van Osdell, a witness called by plaintiff, being duly sworn, was examined, and testified as follows:

Q. I believe you are an architect?

A. Yes, sir.

Q. And have been for a number of years?

A. About twenty years in this city.

Q. Do you know the defendant, Allen Robbins?

A. Yes.

Q. Did you design that building for Mr. Robbins?

A. I did.

Q. Did you superintend its erection?

A. I did.

150 Q. Did you furnish the plans upon which it was erected?

A. Yes.

Q. For the defendant, Mr. Robbins?

A. Yes, sir.

Q. Have you got the ground plans of the building that you produced on the former trial?

A. I have not, sir; they are not in my office.

Q. Have you looked for it?

A. I have looked for it, but they are not in my office.

Q. Will you look at that rough sketch (produced) and say whether it gives the idea?

A. This represents an area around the corner of the building which was similar to the way that thing was constructed.

Q. Are the dimensions similar? It is not made on any particular scale, but it is intended to show the dimensions?

A. That is right, the area four feet ten inches.

Q. That conveys an idea of the opening that has been spoken of?

A. Yes.

Q. Intended to be covered by this grating, as it is called?

A. The opening that is spoken of was not intended to be covered, but to have a rail round it. The grating had been finished, but the part that was to have the rail was unfinished for want of the rail; it was put round
151 afterwards—a vertical rail round the area.

Q. The excavation under the sidewalk was used in what way? For what purpose was it made?

A. They were designed for vaults for coal.

Q. Were those vaults appurtenant to the building to be used by the tenants for storing coal and other matter?

A. Yes; by the tenants for storing coal and other matter,

Q. Was that excavation under all the sidewalk?

A. Yes, under both streets.

Q. Was that part of your plan?
A. Yes, sir.
(To which interrogatory and its response, defendant by his counsel objected. The court, (Davis, J.,) overruled the objection. He is not speaking of the contents of the plan; he is just saying whether the excavations were used for the uses of this building.)
Q. What was the depth of this area from the top of the grating or the top of the sidewalk?
A. Seven feet eleven inches.
Q. From the top of the sidewalk to the floor at the area?
A. Of the area.
Q. Do you recollect, Mr. Van Osdell, the old sidewalk that was on that side of Wells street before the commencement of the erection of this
152 building?
A. Yes, sir; I remember it very distinctly.
Q. There was an old wooden sidewalk there?
A. There was.
Q. Do you know who removed it?
A. I do not.
Q. Was it some of the men employed on the building?
A. My impression is it was Mr. Button, the contractor for the mason work.
Q. He removed it?
A. I think he did.
Q. Who excavated the earth that was taken out from the sidewalk?
A. The mason contractor, Mr. Peter Button.
Q. Was he a contractor for Mr. Robbins?
A. Yes.
Q. Was that a part of his duty to prepare that excavation?
A. It was.
Q. And it was done by him?
A. It was done under his charge and superintendence.
Q. Was Mr. Robbins about the building at the time that this work was going on?
A. He was.
Q. And saw it going on?
A. He did.
Q. Was that excavation and that work upon the area or the curb walls, was that a portion of the work being done for Mr. Robbins?
153 A. It was.
Q. Did you certify to Mr. Robbins upon which he made payments for that work as well as the rest?
A. I did, sir.
Q. You say then, Mr. Van Osdell, that was a portion of the design. I mean to make the excavation under the sidewalk?
A. I was part of the design.
Q. Mr. Robbins was aware of it and saw it being done?
A. Yes.
Q. Was the building erected and all the appurtenances to it in conformity with the plan made by you?
A. It was with some slight changes. I don't remember what.
Q. Substantially?
A. Yes.
Q. And superintended by you as architect for Mr. Robbins?
A. Yes, sir.

Cross-examination.

Q. Were you familiar, in the spring of 1856, with the location where this building was situated?

A. Yes, sir.

Q. Was it vacant in the spring of 1856?

A. I think it was vacant. There were no buildings upon it.

Q. How large a building was this, in general terms, that Mr. Rob-
154 bins contracted for?

A. Eighty (80) by one hundred and fifty (150).

Q. Upon the ground?

A. Yes, sir.

Q. Were you familliar at that time with the street in front of the building?

A. Yes; I had often seen it.

Q. Wells street front, I should say?

A. I had seen it for many years.

Q. And with this sidewalk on Wells street?

A. Yes, sir.

Q. Was the sidewalk at that time placed upon the natural surface of the ground, or substantially so?

A. It was so in Wells street. It laid flat upon the ground most of the length of the building; but on Water street it was a little on an inclined plane. Sleepers were placed on the ground and the plank laid directly on these.

Q. What was the width of the old sidewalk?

A. I think it was twelve (12) feet.

Q. In regard to the surface of the ground where the building was constructed, what was the condition of it with reference to the street and sidewalk?

A. It was slightly lower than the common street on Wells street, and considerably lower on Water street.

Q. At the corner of Wells and South Water street?

A. There it was somewhat elevated on the scantling.

155 Q. How was the excavation of the sidewalk, and of the ground where the building was placed, produced?

Witness. How was the excavation produced?

Counsel. Yes, sir.

Witness. I don't know as I understand the question exactly.

Counsel. How was it done? How was it made?

Witness. For the main depth of it?

Counsel. How was it done? Was it done by digging out?

A. I suppose it was done by digging and throwing the earth into waggons.

Q. Go on and describe, if you please, how the excavation of the place, where the building was, was made, and also the excavation of that portion of the street occupied by the sidewalk.

A. It was dug out and carried off in wagons from the premises.

Q. Was the whole surface of the lot excavated?

A. Yes, and the surface under the sidewalk to the same level.

Q. So the bottom of the lot was put upon a level base that embraced the area and sidewalk? The sidewalk was brought to a level with the lot itself in excavating?

A. Yes.

Q. How much was taken off by that excavation near the corner of Wells and South Water streets? About how much?

156 A. Well, I never measured the depth from the surface of the ground, but my recollection is it was not over eighteen (18) inches in the average. Perhaps on Wells street, at the southeast corner, it was deeper. The lot had been filled in by rubbish.

Q. How at the northwest corner?

Witness. That is at the corner of the street?

Counsel. Yes.

A. I don't believe it was over eighteen (18) inches below the natural surface.

Q. So far as the sidewalk was concerned, you say the excavation was carried out to the outer side of the sidewalk. State whether any cement and stone covering was put over this space covered by the sidewalk.

A. There was a bed of three inches of sand laid upon this excavation, and three-inch flagging, raising the surface six (6) inches.

Q. So that the original excavation was reduced to twelve (12) inches?

A. Yes.

Q. What time was that completed?

A. It must have been done in November.

Q. You remember the situation of the old sidewalk, and now I will call your attention to the new sidewalk provided for in the plan. How
157 much higher was the new sidewalk than the old sidewalk? About how much higher is the present sidewalk than the old sidewalk as it then was?

A. I should judge, from my recollection of the excavation, about six (6) feet six (6) inches, something like that. The old sidewalk was about that below the present.

Q. How long after this excavation was it, if you know, that the city commenced to fill up the carriageway of the street to the outer line of the sidewalk?

A. I don't recollect the exact date. It was while we were in progress with the building.

Q. It was during the progress of the building?

A. Yes.

Q. What was this open space from the outer line of the sidewalk next to the carriageway into the outside wall of Mr. Robbins's building, that is to say, sixteen (16) feet, the width that sidewalk produced? If you know, state what were the causes that produced it.

A. By building the curb wall and the excavation.

Q. Was the curb wall carried out of the outer line as the street was filled in by the side or afterwards?

A. The curb wall was built previously to filling in.

158 Q. At what time was the street fully filled up and carried up—the carriageway of the street? Was not the street being *being* filled in at the same time that the curb wall was being built?

A. My recollection is that the curb wall was built before the filling in. It was about one of the first things that we did.

Q. What depth was the street filled up subsequently?

A. Well, sir, I do not know exactly. I never took a survey of it with a view to ascertain the filling.

Q. Was it filled up nearly even with the top of the curb wall?

A. I should think the crown of the street was level with the sidewalk.

Q. State whether the curb wall was a proper support for the earth.

A. It was designed to be.

Q. Was it designed to be a proper support?

A. It was built in the usual manner of curb walls.

Q. What benefit was that curb wall to the street itself—to the body of the street?

A. It kept the earth from falling in under the sidewalk.

Q. It supported the pavement, also kept the body of the street in its place?

A. Yes, sir.

159 Q. Will you state whether there was any access from the body of the street up on to this sidewalk or on top of this curb wall, until the city filled in the old carriageway of the street to the level of the curb wall?

A. It would have been difficult to get upon the wall without a ladder before it was filled in.

Q. Do you remember what time the filling in of the body of the street was completed and the Nicholson pavement was put down?

A. I don't remember. It was put down some time in the summer or fall.

Q. Was it down before this accident to Woodbury?

A. I think it was.

Q. Mr. Van Osdell, if there had been a curb wall built that high, and the body of the street had been raised in the manner in which it was, and no filling had been placed upon the space taken up by the sidewalk, what would have been the condition of things between the outer line of the sidewalk and the outer line of Robbins's building on Wells street?

(To which interrogatory plaintiff, by its counsel, objected. Objection sustained. To which ruling the defendant then and there excepted.)

160 Q. This stone wall that you built, this was at the outer edge of the sidewalk sixteen (16) feet from the street line?

A. Yes, sixteen (16) feet from the line.

Q. Without the stone wall you could not excavate for coal holes?

A. No, nor could not fill the stone in.

Q. Was any more of this hole that has been mentioned here produced by excavating on the part of Mr. Robbins than you have described?

A. There was no more excavation than I have described the depth of. He made an excavation about eighteen (18) inches below the surface.

Q. And a filling in of six (6) inches?

A. Yes, of the sand and flagging.

Q. You know that there were walls constructed—the curb and another one—on which to rest the flagging on this area? You know that fact?

A. There was a curb wall, and what we termed an area wall.

Q. I ask if these walls were proper supports for the sidewalk alone, in case this space was never to be used for coal holes?

A. They were proper for that purpose.

Q. Were they not in fact better than the usual supports that were adopted in putting down sidewalks in this city at that time?

A. I don't know of any other method of setting down sidewalks except to set them on iron columns.

161 Q. They were sometimes set on scantling like an inverted block?

A. Wooden sidewalks.

Q. And they have all a hollow space?

A. Yes I did not know you had reference to such a sidewalk as that.

Q. Is it not true that sidewalks were made in this city according to the ordinance, that are put up, or are constructed on boards and timbers, whereas the street itself was far below?

Q. State if you were familiar with the mode in which you usually constructed sidewalks, and if this was so made.

A. There is nothing peculiar; we had made them previously the same.

Q. Is that so as to the supports of the sidewalk?

A. We had used them previously the same.

Direct examination resumed.

Q. In making that area wall about which you have been enquired of by the learned gentleman on the other side—the wall next to the building, which you describe as the area wall, and the wall next the carriageway, which you describe the curb wall—the height of the walls was regulated in what manner?

A. I called upon Mr. Greely, city surveyor, to give me the height.

Q. He gave you the grade?

162 A. He gave me the grade, and we were afterwards advised to put it eight (8) inches higher.

Q. You called upon Mr. Greely, the city surveyor, as the superintendent of Mr. Robbins?

A. I did, sir, and he gave me the height of the wall.

Q. You had the wall erected for Mr. Robbins accordingly?

A. Yes.

Q. Afterwards it was found necessary to raise the wall eight (8) inches higher, and that was done?

A. It was made on account of the approach of the bridge.

Q. You directed it to be made eight (8) inches higher?

A. We did.

Q. All this was done; the streets filled, the walls built, and these extra eight (8) inches were put on before the flagging was laid, was it not?

A. Certainly.

By defendant's counsel.

Q. Mr. Van Osdell has said that the area and side walkwere constructed according to the original plans. Mr. Granger testified that he found it necessary in making a proper approach to the Wells Street bridge to raise the grade of the approaching street eight (8) inches, and he directed Mr. Robbins to raise his wall eight (8) inches. Now I ask if that did not add eight (8) inches to the depth of the space beneath the sidewalk and area?

Ans. It did.

163 Q. You said you put in two walls. Do you put that to all sidewalks where you don't allow the owner to excavate and use them?

A. No, sir; I will correct myself. They do build a curb wall by order of the city now.

Q. Did they do it then?

A. They did not do it then, but they do now.

Q. Every particle of the work is done at the expense of the adjoining owner, the building of the street, and the filling in, and he may have just such work as he liked?

A. Yes, about so.

By plaintiff's counsel.

Q. At all events, whatever might have been the practice of building curb walls by the city, this curb wall and area were built by Robbins?

A. They were.

Defendant's counsel.

Q. Was it not absolutely necessary to enable the city to put down the Nicholson pavement? Could the city place it down without some curb wall?

A. They could have built up under the sidewalk and set a curb?

Q. Could they have put down the Nicholson pavement properly without a curb wall being put down by Mr. Robbins or some one?

164 A. They could have put a curb in on an embankment of earth.

Q. Understand my question. If the Nicholson pavement had been put down on the original surface of the ground, and the city had not raised it at all, then perhaps they could have put down the pavement without a curb wall; but suppose the city had raised it several feet, could the city have put its Nicholson pavement over there without either putting in a curb wall itself or getting somebody else to do it?

A. They could have put on the Nicholson pavement by filling the space under the sidewalk from line to line with the street.

Q. But not without filling it up entirely?

A. Of course not.

Plaintiff's counsel.

Q. Unless the city built a curb wall?

A. They could have built a curb wall.

Robert Hervey, a witness being called by the plaintiff, being duly sworn, said, I have computed the interest upon fifteen thousand (15,000) dollars, from the twenty-fourth (24) day of June, 1857, the date of the recovery of the judgment, up to the present day, at six per centum, and it amounts to six thousand three hundred and sixty-five (6,365) dollars. I have computed the interest on one hundred and thirty-one dollars and five cents, ($131 05,) being the amount of costs and sheriff's fees from the date of pay-
165 ment, the 30th July, 1867, the dates of satisfaction endorsed on the execution to the present day, and I make it fifty-two (52) dollars, making in all twenty-one thousand five hundred and fifty-one dollars and seven cents, ($21,551 07.)

Mr. Adams. I will ask of Judge Drummond if he has found the declaration.

Drummond, J. If I had this declaration, it has got put on the files of some other papers. I have looked among all my miscellaneous papers, and I can't find it. I am very well persuaded that I have not got it.

Mr. Fuller. That statement may be taken as evidence.

Davis, J. Mr. Bradley, have you seen it?

Mr. Bradley, (clerk of court.) I have never seen it.

Mr. Adams. I suppose Mr. Bradley's statement may be taken as evidence under oath.

Mr. Fuller. Oh yes, of course.

Plaintiff rested, reserving the right to introduce witness, Orrin J. Rose, to secure whose attendance attachment issued.

Defendant's case.

Defendant introduces in evidence chapter 53 of municipal laws,
166 1856, of Chicago, article 1, sec. 1, 12, 13, as follows, to wit:

"SECTION. *Be it ordained by the common council of the city of Chicago,* That all sidewalks which may be ordered by the common council shall be constructed under the superintendence and to the satisfaction of the street commissioner. They shall be built of the width hereinafter specified, of sound two-inch pine plank, firmly set upon and spiked to suitable bearings of not less than three by four white oak scantling, let into the earth or filled in between, so as to form an even grade, unless the order for the same shall require different materials or width. When built full width, a substantial curbing of stone or white oak plank, not less than three inches in thickness, well tied in, shall be laid on the outer edge of the sidewalk.

"SEC. 12. The grade for sidewalks shall be given in the several divisions by the superintendent of public works, the street commissioner, or by the committee on streets and alleys of the division, until a permanent grade shall be established by the common council. It shall be the duty of the street commissioner to superintend the construction of sidewalks so far as it may be necessary, to compel their construction of the material and
167 in the manner herein prescribed. If any person shall fail to comply with this ordinance in the building any sidewalk, the street commissioner shall direct the same to be relaid, and in case of refusal or neglect to comply with such order, he shall report the same to the common council in the same manner as if the same had not been laid.

"SEC. 13. If any person shall build or assist in building any sidewalk where no grade has been established, without first obtaining a grade therefor from the city superintendent, the street commissioner, or the committee on streets and alleys of the proper division, or contrary to any grade which may be obtained from such officers, or shall build or assist in building any sidewalk contrary to any grade which may be hereafter established by the common council, or contrary to any of the provisions of this article, he shall in either case be subject to a penalty of ten dollars for every offense, and to a like penalty for every day he shall fail to remove or reconstruct the same after notice by the street commissioner or any alderman of the division to remove or reconstruct the same."

Clause 30, chapter 4 of the charter of the city of Chicago, approved February 14th, 1851, as follows, to wit:

168 "Thirtieth. To have exclusive power over the streets and alleys, and to remove and abate any obstructions and encroachments therein."

Section 1, article 2, chapter 53, of municipal laws of Chicago, of 1856:

"*Be it ordained by the common council of the city of Chicago*, That no porch, gallery, stoop, steps, cellar door, stair railing, or platform erected or to be erected within the city shall be allowed to extend into or upon any sidewalk where the street is less than seventy feet in width more than four feet, nor more than five feet where the street is seventy feet and upwards in width. Any violation hereof shall subject the offender to a penalty of twenty-five dollars, and to the like penalty for every day such violation shall continue after notice from the marshal or street commissioner of the proper division to remove the same."

169 The municipal laws of 1856, with the charter of the city of Chicago, approved February 14th, 1851, were then presented in evidence.

The ordinance of the city establishing the grade of Wells street, at the corner of South Water street, passed by the common council of the city, March 13th, 1855, and fixing the future grade at 8 75-100 feet above the level of the Chicago River, was here read in evidence.

Sec. 10 of city charter, approved Feb. 14, 1851, and in force since that time until after the accident to Woodbury occurred, was here read in evidence, and is as follows:

"SEC. 10. All owners or occupants in front of or upon whose premises the common council shall order and direct sidewalks or private drains communicating with any main drain to be constructed, repaired, relaid, or cleansed, shall make, repair, relay, or cleanse such sidewalks or private drains at their own cost and charges, in the manner and within the time prescribed by ordinance or otherwise, and if not done in the manner and within the time prescribed, the council may cause the same to be constructed, repaired, relaid or cleansed, and assess the expenses thereof by an order to be entered in their proceedings upon such lots, respectively, and collect the same by warrant and sale of the premises as in other cases. A suit may also

170 be maintained against the owner or occupant of such premises for recovery of such expenses as for money paid and laid out to his use at his request."

Plaintiff's case resumed.

Orrin J. Rose, a witness called by plaintiff, being duly sworn, was examined, and testified as follows:

Q. You have resided in the city for a number of years?

A. Yes, sir.

Q. You were here in 1856?
A. Yes, sir.
Q. You were then connected in some official capacity with the city government?
A. I was city treasurer in 1856.
Q. Where was your office at that time?
A. On the corner of Wells and Lake streets.
Q. Where did you reside at that time?
A. I resided on Wells street, in the north division.
Q. How did you go from your office to your residence?
A. Across Wells Street bridge.
Q. Do you know the defendant, Allen Robbins?
A. Yes, sir.
Q. Do you know this large building—the iron-front building?
A. Yes, sir.
Q. On the corner of Wells and South Water streets?
A. Yes, sir.
171 Q. That was erected by Mr. Robbins?
A. Yes, sir.
Q. State whether in the month of December you recollect hearing of the accident to this man Woodbury.
A. Yes.
Q. State whether you about that time were in the habit of passing the portion of the building fronting on Wells street.
A. I passed there three times a day.
Q. Do you remember about what time the flagging was laid down on Wells street?
A. I do.
Q. About what time was it laid down?
A. The flagging was laid down during the fall of 1856.
Q. What was the condition of the sidewalk between the inner side of the flagging and the building about that time?
A. The area or place in there beside the building was usually kept open—exposed. I frequently remarked to parties working there that——
Mr. Fuller. Wait.
Q. Do you know Mr. Button?
A. Yes, sir.
Q. Did you have any conversation with him?
A. I have no recollection of talking to him about it.
Q. How soon before the accident, or how recently before the accident, did you see this area that you have described on Wells street?
172 A. During the winter it was open. In the month of December, when there was ice there, I noticed it very frequently, and came very near tumbling in there myself one night in coming over the bridge.
Q. Was there any protection there at all?
A. None at all; no sir. If there was any, it was in places, and did not amount to anything; did not prevent any person from tumbling in.
Q. It did not prevent any one from tumbling in?
A. Not after the flagging was put on.
Q. Do you recollect hearing of the accident?
A. Yes.
Q. Do you recollect the day of the week it happened?
A. I think it was on Sunday. It was about the holidays.
Q. Can you state definitely how shortly before that you saw it.
A. I passed there that day.
Q. On that Sunday.
A. Yes, sir.

Q. Then it was open as you have described it?
A. Yes, sir.

Cross-examination.

Q. Are you engaged in the board of public works for the city?
A. Yes, sir.

Q. What called your attention to the fact that this accident was
173 on Sunday?

A. I remember of passing there about the time of the accident, and I heard of it almost the first one.

Q. Have you a definite recollection that you passed on Sunday, or is it a general one?

A. I remember that I passed, and I remarked to a party I hope we would not have to pay for any man's leg or neck before I got out of office.

Q. Did you make that remark on Sunday?

A. At that time. In fact, before that I had said that the city would have to pay for some accident. I had remarked it to the workmen. Being a city official, of course I felt a little interest in this thing.

Q. You will only answer the questions that are asked of you, unless you are particularly desirous of going beyond. Did you ever see any boards laid over the area?

A. There was boards laid in places going from the sidewalk to the building—going to the doors.

Q. Was that the only place?

A. It amounted to nothing. There was occasionally planks laid from one to another, where they went lengthwise to the building. Occasionally one or two, but there was space enough between the plank and the flagging for a man to fall through.

How wide were the planks?

A. Ordinary width.

174 Q. About three feet.

A. I should not think they were over a foot wide.

Q. Narrow planks?

A. I should judge so. Twelve or sixteen inches wide.

Q. How many would be laid along?

A. I don't remember.

Q. More than one?

A. Yes. There might have been strung along three or four.

Plaintiff rested.

Defendant's case resumed.

The deposition of Allen Robbins, defendant, was read to the jury.

Objections were made by pl'ff to the following interrogatories, to wit: sixth, seventh, eleventh, thirteenth, seventeenth, thirty-first, thirty-fourth, thirty-fifth and thirty-eight.

The objection of plaintiff by its counsel was sustained as to the thirty-fifth interrogatory, which with its answer was excluded, to which ruling the defendant by his counsel then and there excepted.

The objections of plaintiff by its counsel to the interrogatories above mentioned, excepting the 35th, were overruled.

175 The said deposition of Allen Robbins is in the words and figures following, to wit:

UNITED STATES OF AMERICA, *Northern District of Illinois:*

Be it remembered, that on this 18th day of July, A. D. 1864, J. L. Proudfoot, a commissioner duly appointed by the circuit court of the United States

for the northern district of Illinois, under and by virtue of certain acts of Congress in relation thereto, did cause Allen Robbins personally to appear before me, at the Briggs House, in the city of Chicago, in said northern district of Illinois, to testify on the part of the defendant in a certain cause depending in the circuit court of the United States for the northern district of Illinois, at Chicago, wherein the city of Chicago is plaintiff and Allen Robbins is defendant.

And the said Allen Robbins was by me first duly cautioned and sworn to testify the truth, the whole truth, and nothing but the truth in the cause aforesaid. I carefully examined the said Allen Robbins, and he did
176 thereupon depose and say as follows, to wit:

Circuit court United States, northern district of Illinois.

THE CITY OF CHICAGO }
versus }
ALLEN ROBBINS. }

Allen Robbins, being duly sworn, was examined by F. H. Kales, esq., and deposeth and saith:

Int. 1. What is your name?

Ans. Allen Robbins.

Int. 2. What is your age and occupation?

A. My age is fifty-nine, and I am a retired merchant out of business entirely.

Int. 3. You are the defendant in this suit?

A. Yes.

Int. 4. Did you erect a building in the year 1856 upon your lot at
177 the southeast corner of Wells and South Water streets, in the city of Chicago?

A. Yes.

Int. 5. Who was the architect of that work for you?

A. J. M. Van Osdell.

Int. 6. Were you during the time the building was in course of erection confined to your room at the Tremont House by sickness? If so, state when you were so confined, and during what months.

(To which interrogatory plaintiff, by its counsel, objected.)

A. I caught a violent cold the latter part of November. I got wet and caught a very violent cold, and after that I did not go to the building at all until February. I was called down there by one of the tenants, Mr. King; he wanted to show me some matters that he complained of in the basement. I was then very weak; in fact, I did not go out of the house that winter more than five or six times. I had my books—my account books and checque books—brought from the office where I kept them, and kept them in the hotel, in the coat-room. I could not go up the stairs to the office where my
178 desk was.

(To the admission of which response in evidence plaintiff, by its counsel, objected.)

Int. 7. Had you any personal knowledge of the progress of the work or the condition of the building, and of the adjoining sidewalk and area on Wells street, during the time you were confined to your hotel by sickness, as before stated?

(To which interrogatory plaintiff, by its counsel, objected.)

A. I knew nothing what was going on at the building after I left the daily inspection of it. Previous to my taking cold I was there every day. I don't think I missed a day from the time I came on from New York until I was taken down with my cold. After that I did not know what was going

on excepting from the report of the architect who gave certificates on me, and I had to draw checques at the hotel.

(To the admission of which response in evidence plaintiff, by its counsel, objected.)

Interrogatory No. 7, being repeated under the objection heretofore stated, deponent made further answer as follows :

A. No; I had no chance of knowing anything about the condition
179 it was in. I know how the sidewalk was built. The preparation for the sidewalk was built, and it was laid; the area was covered before I was taken sick with flagging, and the floor of the vaults also was covered by stone.

(To the admission of which response in evidence plaintiff, by its counsel, objected.)

Int. 8. You don't mean that the area was covered ?

(To which interrogatory plaintiff, by its counsel, objected.)

A. I suppose between the vaults and the building this stone they put in.

Int. 9. State, if you know, in what manner the area on Wells street was covered, up to the time when you ceased to visit the building.

(To which interrogatory plaintiff, by its counsel, objected.)

A. Before the sidewalk was laid the whole of the sidewalk and the area was covered with strong joists, such as was put in the building to support the floor, covered over entirely by Mr. Sollit, the carpenter. When the side-
walk was laid these were taken up and stone put down, and following
180 around until all the stone was laid; and then the area was protected by laying on barrels and joists across lengthwise on Wells street. That was up to the time that I left the building. That is, I was not there at all while the grating was being laid.

(To the admission of which response in evidence plaintiff, by its counsel, objected.)

Int. 10. The iron grating you mean ?

(To which interrogatory plaintiff, by its counsel, objected.)

A. The iron grating. I was not there at all.

(To the admission of which response in evidence plaintiff, by its counsel, objected.)

Int. 11. State whether during the time you were accustomed to visit the building any complaint as to the condition of the sidewalk and area on Wells street was made to you by any one on behalf of the city or otherwise.

(To which interrogatory plaintiff, by its counsel, objected.)

A. There was no complaint made to me by any one at any time.

(To the admission of which response in evidence plaintiff, by its counsel, objected.)

Int. 12. Did you in 1856 know Elias Shipman, who testified in this
181 case on former trials ?

A. I did not know him; I do not know him now even. I never knew there was such a party.

Int. 13. State whether you ever received from said Elias Shipman any note, letter, or notice, either through the Chicago post-office or otherwise, notifying you of the dangerous condition of the area and sidewalk, or either of them, during the year 1856, or at any time ?

(To which interrogatory plaintiff, by its counsel, objected.)

A. I never received any letter from Mr. Shipman. I did not receive either a letter, notice, or note from Mr. Shipman or any other party whatever.

(To the admission of which response in evidence plaintiff, by its counsel, objected.)

Int. 14. Can you, and if so, state what was the condition of the work on the sidewalk and area at the time you last saw it before you were taken sick?

(To which interrogatory plaintiff, by its counsel, objected.)

A. The sidewalk was laid complete. The iron grating was not laid, but the area was protected.

182 (To the admission of which response in evidence plaintiff, by its counsel, objected.)

Int. 15. State how it was protected.

(To which interrogatory plaintiff, by its counsel, objected.)

A. It was protected, as I said before, by barrels put up and joists laid across on the ends.

(To the admission of which response in evidence plaintiff, by its counsel, objected.)

Int. 16. Do you know Elihu Granger?

A. Yes.

Int. 17. What do you know, if anything of the raising of the grade of the street and sidewalk in the summer or fall of 1856 above the then established grade? How many inches was the grade raised, under what circumstances? And state generally all that you know about the matter enquired of as to what was done, and how long it took to complete the new grade.

(To which interrogatory plaintiff, by its counsel, objected.)

183 A. The city surveyor then, with the architect, Mr. Van Osdell, went and had the grade marked up to which I could build upon the adjoining building. On the building opposite, right due west, they filed a mark into the iron piles; the building east of me they marked into the brick. I cannot give the height of the grade there; it was the grade established by the city, taking, I think, the centre of State street, and then the regular incline to Lake Street bridge. What it might be opposite to my building I do not know, and the plans for the building were graduated accordingly. That was in 1856. I don't know what time the corporation ordinance was passed, establishing the grade in the first place, but I was bound by it, and the city surveyor would not permit me to go one inch one way or the other; he kept me strictly to the grade as established, and the building went up upon that plan. When I wanted to lay my sidewalk, I found that the water off the street would flow right into my basement. They had in making an approach to the bridge raised the street beyond what they supposed would be necessary, and Granger did not for a long time come near the work, and I could not get him to fix the grade for my sidewalk, so that I could lay it. He kept me a long time, and he kept Van Osdell running after him. He said he was ill;

184 finally he brought some surveyor there and gave me the grade for the sidewalk; and just there the corner was level with the street, so that in heavy rains the water would wash over from the street into my basement. They put me up about nine inches—from nine to ten inches—all around the whole building. I had to make a contract, I recollect, for more stone with the mason—hewn stone. I had also to fill the street beyond the established grade, and it took many more loads of earth before the Nicholson pavement was laid.

(To the admission of which response in evidence plaintiff, by its counsel, objected.)

Int. 18. State with whom the contract was made for putting down the stone flagging in Wells street, and with whom the contract was made for putting down the iron grating.

(To which interrogatory plaintiff, by its counsel, objected.)

A. The contract for the sidewalk was made with the Messieurs Cook; they became very impatient in consequence of the delay. They were overloaded with stone at their works, and they compelled me to pay them before they brought any of the work upon the ground, otherwise they would take

185 and pile it in the street; they could not accommodate me any longer, so I paid them for the stone in advance.

(To the admission of which response in evidence plaintiff, by its counsel, objected.)

Int. 19. Did they afterwards put down this stone?

(To which interrogatory plaintiff, by its counsel, objected.)

A. They put down the sidewalk.

(To the admission of which response in evidence plaintiff, by its counsel, objected.)

Int. 20. About what time was this contract made with Cook & Company?

A. It was made the winter previous—the time I made the contracts for all the work; as the tenders were sent in to Van Osdell's office, the lowest bidder got the work. The contract for the iron grating was made with Mr. Letz.

Int. 21. When was that contract made?

A. It was made at the same time; they were all made together; at least, there was not a variation of a fortnight of the bids being sent in.

186 Int. 22. State whether Letz & Company did afterwards put down the iron grating.

(To which interrogatory plaintiff, by its counsel, objected.)

A. They put it down and paid them for it; I did not see them put it down; I was not there one day or one hour whilst that work was going on.

(To the admission in evidence of which response plaintiff, by its counsel, objected.)

Int. 23. Do you know whether both or either of the contracts with Letz & Company and with Cook & Company were in writing?

A. I can't tell you; Van Osdell drew up the contracts according to the specifications for me to sign; I signed a number, but whether for all the work or not, I could not tell.

Int. 24. State whether you have looked among your papers, and whether you have been able to find any written contract with either Cook & Company or Letz & Company.

A. There is none among any papers; all the contracts were left in

187 Van Osdell's office; I did not take any of them away; he was superintendent, and had to have the specifications and contracts under his eye.

Int. 25. Within what time were Cook & Company and Letz & Company to complete their respective contracts?

(To which interrogatory plaintiff, by its counsel, objected.)

A. I won't be positive to a day exactly, but I think we were to have the building ready for Cook the first of July; that is, he was bound if the building was ready, he was bound to lay the sidewalk in July, and he came frequently to me, wishing me to make preparations to allow him to take up these joists and put them down. The stone was in his yard, and he wanted the money for it.

(To the admission in evidence of which response plaintiff, by its counsel, objected.)

Int. 26. What is the reason you did not comply with their request?

(To which interrogatory plaintiff, by its counsel, objected.)

A. The architect could not tell how high or where to put the side-

188 walk; how much it was to be raised. The approach to the bridge had raised the street beyond the established grade.

(To the admission in evidence of which response plaintiff, by its counsel, objected.)

Int. 27. Within what time was Letz & Company to complete the contract for putting down the iron grating?

(To which interrogatory plaintiff, by its counsel, objected.)

A. I can't tell you exactly.

Int. 28. Previous to what time, if you know?

(To which interrogatory plaintiff, by its counsel, objected.)

A. I think it was to have been done—to have been complete—by the middle of October; I think we were ready for it.

(To the admission of which response in evidence plaintiff, by its counsel, objected.)

Int. 29. State what directions, if any, were given to you during the summer or fall of 1856 by Mr. Granger as to the manner in which the area in question should be kept covered, and what conversation you had with him on that subject.

189 (To which interrogatory plaintiff, by its counsel, objected.)

A. I can't give you the conversation exactly; he was passing there almost every day on his way home, and sometimes he would stop and chat for a moment or two, and caution me about keeping the excavation for the sidewalk covered, which I had provided for in the contract with the mason.

(To the admission in evidence of which response plaintiff, by its counsel, objected.)

Int. 30. State whether you are acquainted with Joshua L. Marsh.

A. Yes.

Int. 31. State whether you ever had, and what conversations with the said Joshua L. Marsh in the winter of 1856-'7, in regard to the suit of Woodbury against the city of Chicago. State whether the conversation, if any, was held, and the circumstances under which it was had.

(To which interrogatory plaintiff, by its counsel, objected.)

A. I met Mr. Marsh at the Tremont House, up stairs, in what was then called the House of David; he was in there. I was reading the
190 newspaper; he asked me to take a glass of ale or something, and he mentioned that he was city attorney, and that such a suit had been commenced against the city by Woodbury, and he had charge of it, and he wanted to know if I knew anything about it; I told him I didn't know anything about it, except what I had been told.

Int. 32. State the whole of the conversation.

A. That was all he said to me; he wanted to know if I knew anything about it; I told him I did not, but I told him I had heard of it through Mr. Livingston, a friend of Mr. Gales, who was then west of Aurora, who was frequently in town, and at one time resided in town, and that this Mr. Livingston had told me that a young man that loged in the same house with him, who was frequently at the Tremont House playing billiards, had fallen in the area of my house, and, said he, he is not hurt at all, but he is advertising in the papers for the parties who assisted him out.

Int. 33. State whether you promised or offered to write to this Mr. Livingston or to any person.

A. I have no recollection of promising to write; I think I told Mr. Marsh that Livingston would probably be in town, as he was as often as
191 once a week or once a fortnight, and that I would see him and ascertain from him anything further which he knew about it if I could.

Int. 34. State whether you ever received any notice, written or verbal, from or in behalf of the city of Chicago of the pendency of the Woodbury suit, or that you might or could assist or participate in the trial or defense of that suit if you choose to do so.

(To which interrogatory plaintiff, by its counsel, objected.)

A. None whatever; I think the first intimation I had about the suit was by Mr. Marsh; no one ever came to me direct from any city authority at any time; Mr. Marsh merely mentioned it casually.

(To the admission in evidence of which response plaintiff, by its counsel, objected.)

Int. 35. State whether you ever supposed, from any communication made to you or from any intimation which you obtained at the time the Woodbury suit was pending, that you were expected or required to participate in the defence of it or had any right or business to do so.

(To which interrogatory plaintiff, by its counsel, objected.)

192 A. No one ever intimated to me anything in regard to it, or told me what I ought to do.

(To the admission in evidence of which response plaintiff, by its counsel, objected.)

Int. 36. Did you know, Mr. Robbins, that a motion was made for a new trial in the suit of Woodbury against the city of Chicago after a verdict was obtained?

(To which interrogatory plaintiff, by its counsel, objected)

A. I did not.

(To the admission in evidence of which response plaintiff, by its counsel, objected.)

Int. 37. Did you ever consent to allow judgment to go upon that verdict and for the motion to be overruled by the court?

(To which interrogatory plaintiff, by its counsel, objected.)

A. Not at all; I was not consulted at all in reference to any matter of that kind.

(To the admission in evidence of which response plaintiff, by its counsel, objected.)

193 Int. 38. Did you know at the time or ever know that the city of Chicago, by its attorney, consented that the motion be overruled and that judgment should go upon the verdict?

(To which interrogatory plaintiff, by its counsel, objected.)

A. Nothing of the kind, sir; I never knew anything at all about it.

(To the admission in evidence of which response plaintiff, by its counsel, objected.)

Cross-examination by Robert Hervey, esq.

C.-int. 1. Mr. Robbins, was the area under the sidewalk a part of the plan of the building?

Witness. The vault, do you mean?

Counsel. Yes.

A. The vaults were part of the original plan represented in the plan and on the working plan.

C.-int. 2. The excavation under the sidewalk was made for your convenience, as the owner of the building?

194 A. Yes; what excavation was made.

C.-int. 3. And was part of the plan of the building?

A. Part of the plan of the building.

C.-int. 4. You knew of the excavation under the sidewalk up to the building having been made?

A. Yes, sir.

C.-int. 5. It was made while you were about the building?

A. Oh! certainly; that is, a portion of it; a portion was made while I was absent in New York.

C.-int. 6. After you returned you saw that it had been done?

A. Yes, sir.

C.-int. 7. The contracts that you spoke of with Cook & Letz contemplated the covering of that excavation?

A. Yes; there was no other place to put the sidewalk.

C.-int. 8. And next to the building where the iron grating was?

A. Yes.

C.-int. 9. Outside of your lot?

195 A. Outside of my lot.

C.-int. 10. Under the sidewalk?

A. Under the sidewalk. The sidewalk is sixteen (16) feet. The corporation gave by special ordinance, upon petition, an area of five feet, to throw light into the basement, and to have ingress and egress.

(To all of which statement, save and except the words "under the sidewalk," plaintiff objected, for the reason that it is not responsive to cross-interrogatory 10.)

C.-int. 11. Then the portion covered by the iron grating, as I understand, is five feet from the building?

A. Four feet (4) ten (10) inches.

C.-int. 12. I understand you that when Mr. Marsh spoke to you of this suit he informed you he was city attorney, and had charge of it?

A. He said he had charge of such a suit.

C.-int. 13. As city attorney?

196 A. He told me who was the city attorney previously, but we did not pay any attention to it. I don't know what it was; he was relating some anecdote about it.

C.-int. 13. But he informed you he was city attorney?

A. I knew he was city attorney.

C.-int. 15. Did he state so?

A. I knew it. I don't think he stated it. When he spoke to me was, I think, in the spring of 1857.

C.-int. 16. Did he mention to you where the injury had happened?

A. No, sir.

C.-int. 17. At your building?

A. He said he thought it was in the area of my building. He did not know. He had not been down there. This Mr. Woodbury, I suppose, told him where it happened.

C.-int. 18. Did he tell you?

A. No, sir. He said he supposed. He did not tell me positively.

197 He said, I think, at the area of the building that you are putting up.

C.-int. 19. I understand that you had heard of the injury from Mr. Livingston previously?

A. Mr. Livingston told me. He was a constant visitor at the Tremont House—almost every day—and he told me of this accident; that the young man boarded in the same house with him, and, said he, he is not hurt any, but he is advertising for the parties who assisted him out.

C.-int. 20. Out of where?

A. Out of the space.

C.-int. 21. Of your building?

A. Yes; he did not say it was my building; he said he was advertising for the parties who assisted him out of the place he fell into. Mr. Livingston was not certain it was my building.

ALLEN ROBBINS.

198 UNITED STATES OF AMERICA, *Northern District of Illinois:*

I, L. Proudfoot, a commissioner duly appointed by the circuit court of the United States for the northern district of Illinois, under and by virtue of certain acts of Congress in relation thereto, do hereby certify that the reason for taking the foregoing deposition is, and the fact is, that the witness above named is material and necessary in the cause in the caption of the said deposition named, and that the said deposition was taken by agreement of the counsel for the respective parties to said suit in my presence, and reduced by Mr. H. Binmore in short-hand writing, and the deposition was sub-

sequently by him written out as herein set forth; and all objections as to the manner of taking the said deposition are waived, and it is agreed that this copy of said short-hand shall be taken in evidence, the same as tho' said deposition had been taken in the usual way.

I further certify that on the 18th day of July, A. D. 1864, I was attended by the counsel for the respective parties to said suit, and by the said witness who, though "ancient and infirm," is of sound mind, and the said witness was by me first carefully examined and cautioned and sworn to testify
199 the truth, the whole truth, and nothing but the truth in the cause aforesaid; and the deposition was in my presence reduced to short-hand writing by said Binmore as aforesaid, and in the presence of the said witness, and from his statements, and after carefully reading the same to the said witness, he subscribed the same in my presence. I have retained the said deposition in my possession, for the purpose of delivering the same with my own hand open into the court for which the same was taken.

And I further certify that I am not of counsel nor attorney for either of the parties in the said deposition and caption named, nor in any way interested in the events of the cause named in the said caption.

In witness whereof, I have hereunto set my hand and seal this 19th day of July, A. D. 1864.

[SEAL.] L. PROUDFOOT, *U. S. Comm'r.*

Endorsed: Filed July 19th, 1864.

W. H. BRADLEY, *Cl'k.*

200 So much of the answer to the 10th cross-interrogatory as is contained in the following words was excluded: "The sidewalk is sixteen (16) feet. The corporation gave by special ordinance, upon petition, an area of five feet, to throw light into the basement, and to have ingress and egress."

To which ruling the defendant by his counsel then and there excepted.

The deposition, except as aforesaid, was then read to the jury.

201 Peter Button, a witness called by defendant, being duly sworn, was examined, testified as follows:

Q. Look at this contract and state whose signatures those are. State in whose handwriting they are.

A. That is a contract between Mr. Robbins and me for the erection of the mason work of that building.

Q. Signed by you and Mr. Robbins?

A. With Mr. Robbins's signature and mine.

Q. Look at this paper and state in whose handwriting the body of the paper and the signature is. State whether you obtained the paper yourself.

A. That, gentlemen, is a permit that I procured from the city authorities to occupy part of the street.

Q. Who is it signed by?

A. L. D. Boone.

Q. Was he mayor at the time?

A. He was. I got it under his hand in his office.

Q. Were you employed by Mr. Robbins to do any portion of the work on this building?

A. I was the contractor for the mason work.

Q. What was the situation of the premises in the spring of 1856?

A. The lot was vacant.

Q. What was the condition of the sidewalk at that time?

A. There was a plank sidewalk on two sides of the lot.

202 Q. How was it on Wells street?

A. On Wells and Water both.

Q. What was the condition of the body or carriageway of the street as to its height, in reference to the sidewalk and the surface of the lot itself—the original surface?

A. I think that the carriageway of the street was a little higher than the surface of the lot.

Q. How about the sidewalk?

A. It was about level with the carriageway of the street.

Q. How much difference would you suppose there was between the level of the sidewalk and the level of the lot?

A. There might have been from six (6) to eight (8) inches; ten inches perhaps. The lot was lower than the sidewalk.

Q. What work did you do?

Witness. When I begun?

Counsel. Yes.

A. The excavation was the first thing.

Q. Go on and state all you did in connection with your employment in regard to the excavation, and all the work you did.

A. I took up the sidewalk, likewise did what excavation was necessary, and put in the walls.

Q. How much excavating did you do on the sidewalk?

203 A. From the line of the lot to the line of the curb wall, I don't think there was over four or five inches taken out. The ground of the sidewalk was lower than on the lot. The sidewalk at the corner was raised upon blocks, so that a dog could run under it, or thereabouts.

Q. Did those blocks stand upon the natural surface of the soil?

A. They did.

Q. How long afterwards did you finish this excavation of the street—the place where the area now is?

A. I took off four or five inches from the natural surface. I might have done it in ten days.

Q. How long afterwards was it that you put in any filling?

A. I think that the flagging was put down in the vaults in October.

Q. How was it put down, and what did it consist of?

A. It consisted of stone laid in sand.

Q. What was the thickness of stone and sand put upon this place?

A. About six or seven inches.

Q. After the stone and sand or the filling had been put into this excavated place, between the building and the outer line of the sidewalk, what

204 was the height as compared with the original height of the surface of the ground?

A. The surface of the stone would have been higher than the ground when I took it.

Q. Higher than it was originally?

A. Yes.

Q. How much?

A. I could not say. I should say three or four inches. I am speaking from memory.

Q. Was this excavation and putting down of the filling of the area—the space where the sidewalk now is—done under your supervision?

A. It was done under my contract.

Q. What personal knowledge had you in regard to it?

A. It was done according to contract.

Q. Did you see it done?

A. Of course I did. I was there constantly, as much as it is possible for a business man to be about his work.

Q. Did you lay the flagging on the surface of this excavated place?

A. I put in the bed of sand and the stone on top of it.
Q. Did you build the curb wall?
A. I did.
Q. Did you build the inside or area wall?
A. I did.
Q. Was that part of your contract?
A. It was.
205 Q. When were those completed?
A. I think the curb wall and area wall were ready for the flagstones as early as the middle of May.
Q. As early as the middle of May?
A. I am not positive.
Q. What do you recollect of its having been raised?
A. I put in the curb walls as quick as I possibly could. We were expecting the iron front from New York, and we wanted the walls ready for them to go to work.
Q. What do you know of the curb wall having been raised still higher?
A. They were raised. I raised them for Mr. Robbins.
Q. When was that?
A. I think the latter part of September.
Q. Do you remember how much?
A. Eight or nine inches.
Q. When was the body of the street itself filled opposite to this work?
A. The city commenced filling about the time that I commenced excavating my ground.
Q. In the spring?
A. Yes.
Q. Where was the earth put you took out of the place you excavated?
A. I sent it across the river.
206 Q. Tell me, if you please, whether the city was not raising the body of the street at the same time the curb wall was being put up?
A. The contractor for the mason work for the abutments of the bridge commenced about the time I did. The city commenced filling in from the abutments south to my building. They were filling in during the progress of my building.
Q. How, in reference to the time the curb wall was put up?
A. They had not filled in by the curb wall when I commenced putting it in, because I thought it was in peril.
Q. What was the use of the curb wall?
A. To sustain the sidewalk.
Q. State if they are proper and usual for supporting sidewalks.
A. They are what is usually used in Chicago.
Q. State if they would be proper, even if the space under them was not used at all.
A. I suppose they would.
Q. What covering, if you know, was placed over?
Witness. After I had built my walls?
Counsel. Yes.
A. It was covered by three by twelve-inch joists, twenty feet long.
Q. How long did they remain?
A. From the time I completed the walls until the sidewalk was laid.
207 Q. Who put on the flagging?
A. Cook.
Q. Who put on the first covering of joists?
A. Sollitt, the carpenter of the job.
Q. Did you cover the whole space?

A. The whole space of sixteen feet was planked up.
Q. What time was the flagging laid?
A. About the latter part of September
Q. It was not laid until after the raise of eight inches was made?
A. No, it was not. The wall was raised before the flagging was put down; that is, the sidewalk.
Q. How long did you continue about the premises at work?
A. I left for the East on the night of the 19th November.
Q. When did you return?
A. Something before Christmas or about Christmas.
Q. Did you know or hear anything about the accident to Woodbury which occurred on the 28th December?
A. I did not hear of it until next spring; the latter part of the winter or next spring.
Q. What time did you return?
A. Some time in December.
Q. Do you remember going on the premises after you returned?
A. I was round there occasionally, but not much.
208 Q. Was your job finished when you left for the East?
A. I considered it so, substantially. I had a few men at work in and about the building at extra work.
Q. Have you any knowledge of the covering after your return?
A. I don't know that I have after my return.
Q. How much is the surface of the new sidewalk above the surface of the old sidewalk?
A. It would be guess-work; I should say, probably six feet.
Q. What is the depth of the area and vaults?
Witness. Now it is finished?
Counsel. Yes.

Cross-examination.

Q. In building the area wall, how did you get the height to build up?
A. The grade was given by the city surveyor, and marks were made on the adjoining building—what we call witness marks.
Q. You built it to ascertain height by direction of the city authorities? You were given the grade?
A. The grade was not given to me; it was shown to me by the architect.
Q. You built your wall accordingly?
A. I did, to the marks.
Q. This wall was built for Mr. Robbins, was it not?
209 A. Yes.
Q. It was part of your contract to build the curb wall and the area wall?
A. Yes.
Q. How was the space under the sidewalk used?
Witness. After it was completed?
Counsel. Yes.
A. For coal vaults and privies.
Q. For the use of the building?
A. Yes.
Q. You say that you left in November for the East?
A. Yes.
Q. You say you have no knowledge of the condition of the covering after your return?
A. I have not.

Q. You removed the old sidewalk?
A. I did.
Q. For him?
A. I purchased the plank of Mr. Robbins and gave him credit at an agreed price.
Q. And when the old sidewalk was there, I understand you, there was no building?
A. None whatever; there was none. There were a few bells and bell-frames.
Q. The lot was almost level with the sidewalk?
A. Very near; a little lower than the sidewalk.
Q. But there was no hole seven or eight feet deep?
A. Oh! no.
210 Q. Beside the sidewalk?
A. No; a person might step down like stepping down from this from the sidewalk.

The deposition of William H. Chenoworth (on file) was then read, in the words and figures following, to wit:

211 UNITED STATES OF AMERICA, *Northern District of Illinois:*

Be it remembered, that on this 19th day of May, A. D. 1864, I, L. Proudfoot, a commissioner duly appointed by the circuit court of the United States for the northern district of Illinois, under and by virtue of certain acts of Congress, did cause W. H. Chenoweth personally to appear before me, at my office, in the city of Chicago, in said northern district of Illinois, to testify on the part of the defendant in a certain cause depending in the circuit court of the United States for the northern district of Illinois, at Chicago, wherein the city of Chicago is plaintiff and Allan Robbins is defendant.

And the said W. H. Chenoweth was by me first duly cautioned and sworn to testify the truth, the whole truth, and nothing but the truth, in the cause aforesaid. I carefully examined the said W. H. Chenoweth, and he
212 did thereupon depose and say as follows, to wit:

(Mr. Anthony, attorney for the plaintiff, objects to the testimony of this witness as incompetent, and it is taken subject to all legal objections as to its competency, &c., &c.)

Interrogatory first. State your name, age, residence, and occupation?

Answer to interrogatory first. W. H. Chenoweth; next birthday, thirty-nine; occupation, architectural iron worker; place of residence, 86 Jackson street, Chicago, Illinois.

Interrogatory second. Where did you reside in the fall of 1856? What was your occupation at that time, and by whom were you employed?

Answer to interrogatory second. I resided on Green street, in the city of Chicago. I was employed in the capacity of foreman or superintendent for Frederick Letz, iron-worker, No. 84 to 92 Franklin street, Chicago.

Interrogatory third. Were you at that time acquainted with Allen Robbins, the defendant?

213 Answer to interrogatory third. I was acquainted with him by sight from the fact of his having been in there occasionally in the office.

Interrogatory fourth. Do you know of Mr. Letz having had a job of putting down iron grating for Mr. Robbins at his building on the southeast corner of Wells street and South Water street, in this city, in December, 1856? And if so, state what you know about it, and the times at which the work was completed.

(Objected to by counsel for the plaintiff.)

Answer to interrogatory fourth. I know that Mr. Letz had a contract with Mr. Robbins to do all the iron work for that building that comes legitimately in our line, including grating for the area; that he had got from Mr. Van Osdel's office; and that the work was commenced from a working plan furnished by Mr. Van Osdel previous to the time of the stone coping being put down, and we had gone on with the work as far as we could till such times as we could get the lineal measurement or lengths of the areas, reserving a space for a pair of winder stairs; and in taking the measurement after the stone coping was put down we discovered that the areas at the north end of the long area on Wells street was narrower by about an inch or
214 three quarters of an inch than what it was at other parts, and over grating being cut out for it to be all of one width, it was necessary to trim that stone so that grating could go in at the lower end, and we commenced finishing the grating and putting it down on or about Christmas, in 1856. Some of it was charged. The first charged, I find, is on the 13th of December, then the 14th of December, and then the 17th of December, and the last charge made for pins and what we call grating fixings, (that is pins going into the wall for the perpose of holding the grates,) there is ten pounds charged on the 27th of December, which was Saturday. Thursday was Christmas day. Friday, as a general rule, Germans very seldom work. That is the day after Christmas; and on Saturday I was there on the return of the men, and gave them instructions in regard to putting down the grating as soon as the stone-cutter would get through with cutting the stone. I left them there and returned to the shop. Then on the next day, Sunday, I was down there in the afternoon, between the hours of two and four, to see how the work had progressed, whether or not the stone-cutter had succeeded in getting through so that they could put any of the grating down or not; and on the Monday following we commenced operations about nine
215 o'clock in the morning with a right smart force of hands with a view of putting all that grating in that hole on South Wells street—the longest area of all. I do not know whether we had put down the grating in the store to be occupied by Crawford or not previous to that, but it seems to me we had put down some of the grating.

(Counsel for the plaintiff objected to that part of the answer which spoke of the entries of charges on the books of Mr. Letz.

Interrogatory fifth. Was that Saturday—Saturday the 27th of December, 1856?

Answer to interrogatory fifth. Yes, sir, it was Saturday, the 27th, as far as my memory serves me.

(Counsel for the plaintiff objected to the answer as not being responsive to the interrogatory.)

Interrogatory sixth. When you were at the building upon Sunday, the 28th was of December, 1856, what was the condition of the area, so far as covering concerned, on Wells street from the corner of South Water street south as far as the grating had not been put down? And if you say that it was covered or protected in any way, state in what manner, as far as your recol-
216 lection enables you.

(Counsel for the plaintiff objected to the interrogatory as leading, suggestive, and incompetent.)

Answer to interrogatory sixth. I believe that the area was covered at the time with some short boards and two long joists over the main hole, and, I think, a protection at the end in the shape of a couple of barrels and a board on the top of them and some small pieces of board laid across the area; and I think these joists laid on their a kind of opened a little more at the north end of the area than what they did at the south end of the length of the joists; but it had the appearance of being as secure as it usually was.

Interrogatory seventh. What do you mean by "being as secure as it usually was?"

Answer to interrogatory seventh. That is as secure as I had formally seen it. As masons work along and as sidewalk workers work along they left a covering there to protect it, and it was about in its usual state as I had seen it in going to and from the store generally. It was as secure as buildings are in the city left by mechanics over Sunday or over night. Most
217 generally there is rather a flimsy protection to it, and it is rather a difficult thing to cover such a place and to protect it well.

Interrogatory eighth. What was the condition of this area at the time you saw it as to affording security to persons passing along upon the sidewalk? (Counsel for the plaintiff objected to the interrogatory as leading and incompetent.)

Answer to interrogatory eighth. Well, any person was perfectly secure against any accident to them, I should think. A person going along the sidewalk, it seems to me as though a man must be insane to meet with an accident there; that is, if he could see.

Cross-examined by Mr. Elliott Anthony.

Cross-interrogatory first. What is your business?

Answer to cross-interrogatory first. My profession is an architectural iron worker or ornimental iron railing maker.

Cross-interrogatory second. How long have you lived in the city of Chicago?

Answer to cross-interrogatory second. I have lived in the city of
218 Chicago since the 16th of July, 1855, except the time I have been absent in the army.

Cross-interrogatory third. In the year 1855 who did you work for?

Answer to cross-interrogatory third. I worked for Frederick Letz in the latter part of it. In the former part of it I worked for T. F. Baker, of Cincinnati, Ohio.

Cross-interrogatory fourth. In the latter part of it you worked for Mr. Letz?

Answer to cross-interrogatory fourth. After the 16th of July Mr. Letz hired me in Cincinnati to superintend his work.

Cross-interrogatory fifth. You were working for him in 1856?

Answer to cross-interrogatory fifth. I was.

Cross-interrogatory sixth. What particular thing did you do when employed by Mr. Letz?

Answer to cross-interrogatory sixth. I was the superintendent of the wrought-iron department, inside, and had a general superintendence over the whole concern.

219 Cross-interrogatory seventh. What concern?

Answer to cross-interrogatory seventh. Mr. Letz's.

Cross-interrogatory eighth. You spoke of Mr. Letz having a contract in regard to this building of Mr. Robbins's. Did I understand you to say he had a contract?

Answer to cross-interrogatory eighth. He had an order to do this work, which we consider and take as a contract. Whether there was any writing or not and stipulations for it to be completed within a given time or anything like that, I am not aware of; but it is what we call a contract; that is, the job had been awarded to him, I suppose, in competition with other mechanics.

Crosss-interrogatory ninth. Do you know whether he had a contract or not?

Answer to cross-interrogatory ninth. I know that he had the work and done the work or had it done by some plans furnished by the architect who was the architect of the building.

Answer to interrogatory fourth. I know that Mr. Letz had a contract with Mr. Robbins to do all the iron work for that building that comes legitimately in our line, including grating for the area; that he had got from Mr. Van Osdel's office; and that the work was commenced from a working plan furnished by Mr. Van Osdel previous to the time of the stone coping being put down, and we had gone on with the work as far as we could till such times as we could get the lineal measurement or lengths of the areas, reserving a space for a pair of winder stairs; and in taking the measurement after the stone coping was put down we discovered that the areas at the north end of the long area on Wells street was narrower by about an inch or
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Cross-examined by Mr. Elliott Anthony.

Cross-interrogatory first. What is your business?

Answer to cross-interrogatory first. My profession is an architectural iron worker or ornimental iron railing maker.

Cross-interrogatory second. How long have you lived in the city of Chicago?

Answer to cross-interrogatory second. I have lived in the city of
218 Chicago since the 16th of July, 1855, except the time I have been absent in the army.

Cross-interrogatory third. In the year 1855 who did you work for?

Answer to cross-interrogatory third. I worked for Frederick Letz in the latter part of it. In the former part of it I worked for T. F. Baker, of Cincinnati, Ohio.

Cross-interrogatory fourth. In the latter part of it you worked for Mr. Letz?

Answer to cross-interrogatory fourth. After the 16th of July Mr. Letz hired me in Cincinnati to superintend his work.

Cross-interrogatory fifth. You were working for him in 1856?

Answer to cross-interrogatory fifth. I was.

Cross-interrogatory sixth. What particular thing did you do when employed by Mr. Letz?

Answer to cross-interrogatory sixth. I was the superintendent of the wrought-iron department, inside, and had a general superintendence over the whole concern.

219 Cross-interrogatory seventh. What concern?

Answer to cross-interrogatory seventh. Mr. Letz's.

Cross-interrogatory eighth. You spoke of Mr. Letz having a contract in regard to this building of Mr. Robbins's. Did I understand you to say he had a contract?

Answer to cross-interrogatory eighth. He had an order to do this work, which we consider and take as a contract. Whether there was any writing or not and stipulations for it to be completed within a given time or anything like that, I am not aware of; but it is what we call a contract; that is, the job had been awarded to him, I suppose, in competition with other mechanics.

Crosss-interrogatory ninth. Do you know whether he had a contract or not?

Answer to cross-interrogatory ninth. I know that he had the work and done the work or had it done by some plans furnished by the architect who was the architect of the building.

Cross-interrogatory tenth. In your direct examination you stated that Mr. Letz had a contract for this work. Now, what did you mean by
220 that?

Answer to cross-interrogatory tenth. I meant that Mr. Letz had the job to do, and it is what we call a contract; when we get a job to do we say we have got a contract to do such and such work for such and such a person, because it is always customary in this city, in doing jobs, there is competition invited and the lowest bidder generally takes it. That is what I mean by Mr. Letz having a contract.

Cross-interrogatory eleventh. You stated in your direct examination that Mr. Letz had a contract for the doing of this work?

Answer to cross-interrogatory eleventh. Yes, sir.

Cross-interrogatory twelfth. Did Mr. Letz ever show you any written contract?

Answer to cross-interrogatory twelfth. I cannot say he ever did show me any contract. I may have seen it, but I do not remember.

Cross-interrogatory thirteenth. Then all that you know about it is that Mr. Letz did some iron work on that building?

Answer to interrogatory thirteenth. He done all the iron work that
221 comes in our branch of business for that building.

Cross-interrogatory fourteenth. Well, sir, what did he do on that building?

Answer to interrogatory fourteenth. Well, he put down the grating, some stairs, furnished a few columns. I think he furnished some of the area columns, door bolts, trap doors, hinges, hooks, and staples, and such things as that.

Cross-interrogatory fifteenth. He furnished those, did he?

Answer to cross-interrogatory fifteenth. Yes, sir; they were made in his shop and put up there. He also drilled holes in the plates for them, and such work as that.

Cross-interrogatory sixteenth. Drilled holes in what plates?

Answer to cross-interrogatory sixteenth. Drilled holes in the plates that was furnished by the New York parties; that is, it was done by his hands.

Cross-interrogatory seventeenth. You say you were the superintendent of Mr. Letz's works during 1856?

Answer to cross-interrogatory seventeenth. During 1856 I had the
222 superintendence of the wrought-iron department.

Cross-interrogatory eighteenth. What do you mean by having the superintendence?

Answer to cross-interrogatory eighteenth. I had charge of the directing of the hands all through the department from July, 1855, until January, 1857.

Cross-interrogatory nineteenth. You say that he did all that came within your department. Now I want to know what particular work he did on the building of Mr. Robbins. Be kind enough to specify the particular iron work that Mr. Letz did on Mr. Robbins's building.

Answer to cross-interrogatory nineteenth. That is, it was furnished from his shop.

Cross-interrogatory twentieth. I do not care whether he furnished it or not. What particular iron work did Mr. Letz do on this building of Mr. Robbins? As there was a contract for the iron work of this building, you will be kind enough to specify what particular iron work Mr. Letz, through his men, did on that building of Mr. Robbins.

Answer to cross-interrogatory twentieth. Well, sir, he furnished the grating for it; that is, he made the grating for it. He made the stirrups to hold up the timbers through the building; that is, to hold up the trimmers and

223 headers. He made the door bolts, hooks, and staples, trap-door hinges, iron railings for the sides like guards, like to prevent people from tripping over when they were on the grating; there was a little iron rail about 5 feet out from the house.

Cross-interrogatory twenty-first. He made that, did he?

Answer to cross-interrogatory twenty-first. He made that iron railing; those are some of the things he made that I remember.

Cross-interrogatory twenty-second. Did he put up this iron railing?

Answer to cross-interrogatory twenty-second. Yes, sir.

Cross-interrogatory twenty-third. Who put up all these other things you speak of?

Answer to cross-interrogatory twenty-third. He put them all up.

Cross-interrogatory twenty-fourth. Did you superintend the putting up of all these things?

Answer to cross-interrogatory twenty-fourth. No, sir; I did not.

224 Cross-interrogatory twenty-fifth. Then, if I understand you right, you did not personally superintend this particular work?

Answer to interrogatory twenty-fifth. Not all of it. I went down there to set the men to work to put in the grating and give them instructions how it was to be done, according as I had received instructions from Mr. Letz. Mr. Letz told me about how it would have to be done.

Cross-interrogatory twenty-sixth. Did you superintend the putting up of the railing and those other things on this building of Mr. Robbins?

Answer to cross-interrogatory twenty-sixth. Only in the case of this grating on the South Wells street area.

Cross-interrogatory twenty-seventh. On the Wells street area, then, you personally superintended the putting on of the grating?

Answer to cross-interrogatory twenty-seventh. Not all of it.

Cross-interrogatory twenty-eighth. What portion of it? Give us the particular work that you personally superintended.

Answer to cross-interrogatory twenty-eighth. I call it superintend-

225 ing if I go and set the men to work. That if I have done that, and can go over at any time afterwards and find that work all accomplished according to my instructions, (I am responsible to my employer that this work is done as he wanted to have it done,) I call that superintending, whether I walk over to see it or not.

Cross-interrogatory twenty-ninth. If I understand you rightly, you superintended all the work going on in Mr. Letz's shop, and simply went down there to set the men to work?

Answer to cross-interrogatory twenty-ninth. I set the men to work.

Cross-interrogatory thirtieth. What did you set them to work at?

Answer to cross-interrogatory thirtieth. I set them to putting the pins in the wall.

Cross-interrogatory thirty-first. In what wall?

Answer to cross-interrogatory thirty-first. In the main wall. I refer to pins three inches long, an inch and a half in the wall and an inch and a half out. They are made to put into the wall to support the grating below the water table, or whatever you may call it.

226 Cross-interrogatory thirty-second. In the foundation of the buildlng?

Answer to cross-interrogatory thirty-second. No, sir; into the upper part; into the body of the building, so that when the grating comes on to it it would be level.

Cross-interrogatory thirty-third. You referred to putting it into the foundation?

Answer to cross-interrogatory thirty-third. You may call it foundation or water course.

Cross-interrogatory thirty-fourth. Then you did not stay over there to set these men to work? You then went back to the shop?

Answer to cross-interrogatory thirty-fourth. Yes, sir.

Cross-interrogatory thirty-fifth. Did Mr. Letz have any man there to take charge of the work?

Answer to cross-interrogatory thirty-fifth. He had a responsible first-class workman.

Cross-interrogatory thirty-sixth. What was his name?

Answer to cross-interrogatory thirty-sixth. I do not remember what his name was.

Cross-interrogatory thirty-seventh. What was the name of any of
227 the workmen that worked there?

Answer to cross-interrogatory thirty-seventh. I do not think I could tell you with certainty out of so many hands.

Cross-interrogatory thirty-eighth. How many hands were there there to work for Mr. Letz?

Answer to cross-interrogatory thirty-eighth. Sometimes three or four, sometimes four or five, sometimes only one or two.

Cross-interrogatory thirty-ninth. Upon this particular work which you superintended how many men were there?

Answer to cross-interrogatory thirty-ninth. I presume about four men or five men, probably six men.

Cross-interrogatory fortieth. Were they to work there all the time?

Answer to cross-interrogatory fortieth. Well, that would depend upon circumstances; if it was necessary to take them off to another job, they would not work there all the time.

Cross-interrogatory forty-first. Did they change hands all the time?

Answer to cross-interrogatory forty-first. Sometimes parties would
228 be working on it at one time, and it would be necessary to send some off to other business.

Cross-interrogatory forty-second. That was so in this case, was it?

Answer to cross-interrogatory forty-second. I do not know whether it was or not.

Cross-interrogatory forty-third. But, as I understand you, these hands were changed backwards and forwards?

Answer to cross-interrogatory forty-third. Changed occasionally.

Cross-interrogatory forty-fourth. Were these particular men changed?

Answer to cross-interrogatory forty-fourth. I have no distinct recollection. A change may have been made in the men.

Cross-interrogatory forty-fifth. You do not know, then, whether there was any change or not?

Answer to cross-interrogatory forty-fifth. I cannot say positively that there was not.

229 Cross-interrogatory forty-sixth. Can you say positively that there was?

Answer to cross-interrogatory forty-sixth. I cannot.

Cross-interrogatory forty-seventh. Can you say positively whether there was any change in the men that you originally put to work there—whether those self same men you first put to work there continued till they got through with the whole work?

Answer to cross-interrogatory forty-second. Why no; I could not say anything of that kind. But I can say this much, that the men who commenced putting the grating on Wells street in probably finished them, because it would not be necessary to take them away after the pins was put in the wall.

Cross-interrogatory forty-eighth. Now, sir, I want you to tell us how many men you put to work there?

Answer to cross-interrogatory forty-eighth. Well, that is too strong.

Cross-interrogatory forty-ninth. I did not ask you, unless you recollect it.

Answer to cross-interrogatory forty-ninth. I do not remember how many there was.

230 Cross-interrogatory fiftieth. When did you set them to work there?

Answer to cross-interrogatory fiftieth. They were set to work there on the Monday, the first Monday after Christmas.

Cross-interrogatory fifty-first. That was the first time these men were set to work?

Answer to cross-interrogatory fifty-first. No, sir; they had been to work before.

Cross-interrogatory fifty-second. Tell me when was the first time you set these men to work?

Answer to cross-interrogatory fifty-second. I went down to put these men to work on Saturday, the 27th day of December. That was the first time I went down there and gave them any instructions about it.

Cross-interrogatory fifty-third. How do you recollect that it was the 27th of December?

Answer to cross-interrogatory fifty-third. Simply from the fact that the pins is the last things that we charge, and we charge them when we take them out.

231 Cross-interrogatory fifty-fourth. Where were they charged?

Answer to cross-interrogatory fifty-fourth. On Mr. Letz's books.

Cross-interrogatory fifty-fifth. How do you know that they were charged on Mr. Letz's books? You did not have charge of the books, did you?

Answer to cross-interrogatory fifty-fifth. I kept a blotter, I should rather think.

Cross-interrogatory fifty-sixth. Then you kept the books also?

Answer to fifty-sixth cross-interrogatory. I did not transfer from the blotter into the books.

Cross-interrogatory fifty-seven. And what particular book is it in?

Answer to cross-interrogatory fifty-seven. It is in the blotter in the first place.

Cross-interrogatory fifty-eight. Have you examined the blotter recently?

Answer to cross-interrogatory fifty-eight. Not very recently.

Cross-interrogatory fifty-nine. How long have you been in the war?

232 Answer to cross-interrogatory fifty-nine. I have been into the war about eighteen months.

Cross-interrogatory sixty. Since you went into the war and up to the present time, have you examined this particular book to see when the charges were made?

Answer to cross-interrogatory sixty. Yes, sir.

Cross-interrogatory sixty-one. When?

Answer to cross-interrogatory sixty-one. I cannot tell exactly when it was. Mr. Letz was speaking to me about the matter, and I came to remember a great many little items about it.

Cross-interrogatory sixty-two. Did you take the book out and look at it?

Answer to cross-interrogatory sixty-two. I had the book before me.

Cross-interrogatory sixty-three. Is this charge in your handwriting?

Answer to cross-interrogatory sixty-three. No, sir; that was in the journal. Everything that I weighed, being foreman, I went in and charged to the party who it was for, and I necessarily knew who it was for.

233 Cross-interrogatory sixty-four. Who did you charge these pins to?

Answer to cross-interrogatory sixty-four. I charged them to Allen Robbins.

Cross-interrogatory sixty-five. That appears on the books charged to Allen Robbins, does it?

Answer to cross-interrogatory sixty-five. Yes, sir; it is in Allen Robbins's account, rather.

Cross-interrogatory sixty-six. Now, sir, how many pins, or pounds of pins, is charged to Allen Robbins on the 27th of December, 1856?

Answer to cross-interrogatory sixty-six. I do not remember. I think it is eighteen pounds; somewhere along there.

Cross-interrogatory sixty-seven. And you know it was the 27th of December that you set these men to work owing to the fact that you charged these pins to Allen Robbins on that date?

Answer to cross-interrogatory sixty-seven. There was a date in the book for it.

Cross-interrogatory sixty-eight. And you put it there?

234 Answer to cross-interrogatory sixty-eight. I put it in the blotter, and the supposition is that it was correctly charged in the journal of course.

Cross-interrogatory sixty-nine. You put it there?

Answer to cross-interrogatory sixty-nine. I had no charge of any books except the books for the first entry, a book that a man with dirty hands can write on.

Cross-interrogatory seventy. That you call a blotter?

Answer to cross-interrogatory seventy. Yes, sir.

Cross-interrogatory seventy-first. Did you furnish any after the 27th of December?

Answer to cross-interrogatory seventy-first. No pins after December 27th.

Cross-interrogatory seventy-second. Did you furnish any before that time?

Answer to cross-interrogatory seventy-second. I think there was only one lot of pins furnished.

Cross-interrogatory seventy-third. What was the date on which you put these charges in the books?

235 Answer to cross-interrogatory seventy-third. It is charged on the 27th of December, 1856, in Robbins's account.

Cross-interrogatory seventy-fourth. And those were purchased by Allen Robbins?

Answer to cross-interrogatory seventy-fourth. Presumed to be purchased by him, they were charged.

Cross-interrogatory seventy-fifth. You say you charged those pins to Allen Robbins before, or that some person got some pins there, and you charged them to Allen Robbins before. Will you be kind enough to state the date before? I ask you the date of any day other than the 27th of December, 1856, that you sold pins to Allen Robbins or any one on his account?

Answer to cross-interrogatory seventy-fifth. I think I told you that there was only one charge of pins. There was some of grating fixings.

Cross-interrogatory seventy-sixth. You say you furnished to Allen Robbins, on the 27th of December, 1856, these pins. Now, sir, on that day, the 27th day of December, 1856, how many men did you set to work?

Answer to cross-interrogatory seventy-sixth. I told you I could not tell definitely.

236 Cross-interrogatory seventy-seventh. About how many?

Answer to cross-interrogatory seventy-seventh. Two, or four or five. I judge from the heft of the work that it would take about that to lift it.

Cross-interrogatory seventy-eighth. Tell me the name of any man that worked on that job?

Answer to cross-interrogatory seventy-eighth. I cannot remember the name of any one man. I remember a great many of the men that worked in the shop. I remember the names of a great many of our leading men in the shop, but I cannot say positively which one it was that worked upon that job.

Cross-interrogatory seventy-ninth. Then you do not recollect the name of a single man that you set to work on that day?

Answer to cross-interrogatory seventy-ninth. I have told you that I could not remember a name.

Cross-interrogatory eightieth. How long ago did you say that you looked at the books to refresh your memory as to the particular date on which these pins were furnished?

237 Answer to interrogatory eightieth. I told you I did not know exactly at what time it was, but it was since my return.

Cross-interrogatory eighty-first. About how long ago is it?

Answer to cross-interrogatory eighty-first. Some time, I think, in March.

Cross-interrogatory eighty-second. Of this year?

Answer to cross-interrogatory eighty-second. Yes, sir, since I have returned home.

Cross-interrogatory eighty-third. How came you to come there to refresh your memory?

Answer to cross-interrogatory eighty-third. I told you from conversation that I had with Mr. Letz.

Cross-interrogatory eighty-fourth. Did you go to see him?

Answer to cross-interrogatory eighty-fourth. No, sir, I met him accidentally.

Cross-interrogatory eighty-fifth. Where did you see him?

Answer to cross-interrogatory eighty-sixth. I think I saw him on the street before I went up there. After I came home, I naturally went

238 to see my old acquaintances, and amongst the rest, as a man I have a great deal of respect for him; but I think it was on the street he mentioned it.

Cross-interrogatory eighty-seventh. How did he happen to mention it to you?

Answer to cross-interrogatory eighty-seventh. It come up in the course of conversation. He mentioned to me a kind of accidentally, I presume, and asked me if I remembered anything about the work of grating for Allen Robbins. That was the cause of Mr. Letz and me looking through the books to refresh my memory to try and correct the matter.

Cross-interrogatory eighty-eighth. What book did you look at?

Answer to cross-interrogatory eighty-eighth. I looked at one of Mr. Letz's books—journal or ledger. I am not bookkeeper enough to know what it is called, journal or ledger. What do you call it?

Cross-interrogatory eighty-ninth. Then you did not look at the book you kept to see the date?

Answer to cross interrogatory eighty-ninth. I did not.

239 Cross-interrogatory ninetieth. Do you know that it was actually in existence?

Answer to cross-interrogatory ninetieth. It may be. I did not think it necessary to hunt for that.

Cross-interrogatory ninety-first. Then the thing that refreshed your memory as to the particular date was looking in Mr. Letz's ledger?

Answer to cross-interrogatory ninety-first. That is the thing that refreshed my memory, and brought it up to the point undoubtedly.

Cross-interrogatory ninety-second. But you did not see it in the book you kept?

Answer to cross-interrogatory ninety-second. No; I presume I might see it.

Cross-interrogatory ninety-third. You say these four or five men you superintended at this time went to putting in pins in the building?

Answer to interrogatory ninety-third. No, sir. I do not think I said that. I said that I went down there to set these men to putting it in, and found that the stone-cutter had not got t hrough, so I left the men with in-

240 structions. The pins had been put in probably in the morning. Finding that the stone man was not done, I left instructions where to commence, and returned to the shop. That is what I call superintending it.

Cross-interrogatory ninety-fourth. I want to know the particular thing you set these men to do on that day?

Answer to cross-interrogatory ninety-fourth. Well, I set them to putting in the grating, I presume.

Cross-interrogatory ninety-fifth. Well, but what particular part of that work did you set them to?

Answer to cross-interrogatory ninety-fifth. I told you just as plain as I could that I took the men down there to set them to putting in the grating, and the stone-cutter was not ready, and I left instructions there, or orders with the men, and said that as soon as he has cut the stone, take the grating and commence at this end, and put it in, and make it all level, and then I returned to the shop.

Cross-interrogatory ninety-sixth. That was the grating?

241 Answer to cross-interrogatory ninety-sixth. The grating over the area on Wells street—the long area.

Cross-interrogatory ninety-seventh. Do you know whether the stone-cutter got through on the 27th of December, 1856?

Answer to cross-interrogatory ninety-seventh. I cannot say positively whether he did or not.

Cross-interrogatory ninety-eighth. Do you recollect what is his name?

Answer to cross-interrogatory ninety-eighth. I do not know his name, and I do not know who he was employed by. He was to cut out and make the area of even width at both ends.

Cross-interrogatory ninety-ninth. You mean on the top stone?

Answer to cross-interrogatory ninety-ninth. The sidewalk stone he was to cut it down two inches deep—to straighten it, as you may call it.

Cross-interrogatory one hundredth. What time did you set these men to work?

Answer. I went down in the afternoon.

Cross-interrogatory one hundred and first. Had the stone-cutter got through on that day?

242 Answer. I cannot say he did.

Cross-interrogatory one hundred and second. Did you put in the grating on that day?

Ans. No, it appears not.

Cross-interrogatory one hundred and third. Did you put any grating in on that day?

Answer. I think not. I left them there to work, and if they did not put any grating in, it is very evident that they worked at different parts—at other parts in drilling holes. They had plenty of other work to do.

Cross-interrogatory one hundred and fourth. Did they on the 27th of December, 1856, fit in any of this grating on Wells street—any portion of it?

Answer. I cannot say. I do not remember it.

Cross-interrogatory one hundred and fifth. Now, as you recollect so accurately the time at which you set them to work, why is it that you cannot recollect what these men did on that day?

Answer. Well, that is very easily answered. There was various

243 jobs then these men could do, and employ themselves to the benefit of their employer. If they could not lift that grating in, they could go on South Water street or up by Crawford's and do various jobs there. They could drill bolt-holes; and another thing, if they got out of employment, they were so trained that they would return to the shop.

(Counsel for the defendant objected to the interrogatory as of too metaphysical a character.)

Cross-interrogatory one hundred and sixth. I asked you the reason why you did not recollect what they did. Is that all the answer to that question?

(Counsel for the defendant objected to the interrogatory on the ground that the witness had already sufficiently answered.)

Cross-interrogatory one hundred and seventh. Why do you not recollect what they did as well as you recollect the date?

Answer. I told you why I recollect the date, because of my regular business habits and my regular system in a well-organized shape are such that I could refer to that book and tell what I did there on all occasions almost; and what gives me the date so positive is Mr. Letz's book, but you
244 still seem to think that I remember the date, and cannot remember anything else. It appears that you have an idea that I am enlightened on that point, and dumb upon other points.

Cross-interrogatory one hundred and eighth. Were these men that you set to work there Germans or Irish; or of what nationality were they?

Answer. They were Germans.

Cross-interrogatory one hundred and ninth. Were they all Germans?

Answer. Yes, sir; they were all Germans.

Cross-interrogatory one hundred and tenth. Will you tell us the reason why you know they were all Germans?

Answer. I could remember that for an indefinite period.

Cross-interrogatory one hundred and eleventh. Is there any particular reason why; anything besides what you have stated?

Answer. Yes, sir; because we did not employ anything but Ger-
245 mans. I happened to be the only American in the establishment.

Cross-interrogatory one hundred and twelfth. You say that all the rest of your men were Germans?

Answer. That worked in my charge. I had charge of all the men in the wrought-iron department. There was a foundry added to that.

Cross-interrogatory one hundred and thirteenth. If I understand you right, you had charge of all the men, more or less, had you not?

Answer. No, sir. I had charge of all the men in the wrought-iron department. Mr. Letz's shop was divided into two distinct departments apparently. He has a foundry, and it is necessary there should be a moulder by trade in it to take charge of that, and he had a man for that purpose, and I had nothing to do with it.

Cross-interrogatory one hundred and fourteenth. How many men had you under your charge?

Answer. I had about ninety men.

Cross-interrogatory one hundred and fifteen. And they were all Germans?

Answer. They were all Germans, I believe, except your humble
246 servant. I do not remember of but one man. I do not remember of one man at that time but what was Germans; that is, they call them Germans—Norwegians, Danes, Hesse Darmstadters. I call them all Germans that cannot speak English plainly; that is, there may be some few exceptions of Scotch.

Cross-interrogatory one hundred and sixteenth. You put these men together at about what hour in the afternoon?

Answer. You will not give me a chance for a presumption, and I cannot state positively about the time. My rule would be to take them out in the middle of the day, after one o'clock.

Cross-interrogatory one hundred and seventeenth. I am asking you about what hour of the day. You can state from two to five o'clock.

Answer. Well, then, we will call it from two to five, because that will fetch it inside of it.

Cross-interrogatory one hundred and eighteenth. I ask you about what hour in the day was it you set these men to work?

247 Answer. It would be about half past one.

Cross-interrogatory one hundred and nineteenth. How late did they work? Do you know?

Answer. They worked till five o'clock.

Cross-interrogatory one hundred and twentieth. Were you down there?

Answer. No, sir.

Cross-interrogatory one hundred and twenty-first. Were you down there any portion of the afternoon?

Answer. No, sir.

Cross-interrogatory one hundred and twenty-second. You were not down there when they quit work?

Answer. No, sir.

Cross-interrogatory one hundred and twenty-third. You spoke about coming down on a Sunday; what day of the week was the 27th of December, 1856?

Answer. It was Saturday.

248 Cross-interrogatory one hundred and twenty-four. You say you was down there on the Sunday?

Answer. Yes, sir.

Cross-interrogatory one hundred and twenty-five. What time on Sunday?

Answer. Somewhere between two and four o'clock. I do not know the exact hour.

Cross-interrogatory one hundred and twenty-six. How come you to go down between two and four on Sunday?

Answer. It was my custom to go round on a Sabbath afternoon most generally when there was any work going on; and I would most generally make it a point to go past any work where I had had the superintendence in the shop to see what kind of show there was, how it looked; that was my general custom the whole of the time I was foreman and after I had become a proprietor.

Cross-interrogatory one hundred and twenty-seventh. Then you superintended on a Sunday too?

Answer. I looked at it as I passed.

249 Cross-interrogatory 128. Was there any one with you?

Answer. No, sir.

Cross-interrogatory 129. Did you go around to all that Letz was doing in that way?

Answer. No, sir. I went around to all the large jobs. I would not go out to the cemetery to see ten feet of railing, and I would not go south; but if it was a large job, and instructions had been left with me to make a good job, I would naturally go and look at it.

Cross-interrogatory 130. You say you were there about two o'clock?

Answer. I was there between two and four.

Cross-interrogatory 131. Tell us why you recollect that it was this particular Sunday afternoon.

Answer. I know it was this Sabbath afternoon because it was my constant habit to do so, and there has been various little items that prove it to my satisfaction that I was there that afternoon. When I get a habit I

250 generally keep it. I do not fly around much.

Cross-interrogatory 132. State those little items that you recollect that make you know so well that it was on the Sabbath or the next day after the 27th.

Answer. One little item was that on the Monday morning Mr. Letz came to the shop and stated that there was a man had fallen down Robbins's area.

Cross-interrogatory 132. He came and told you?

Answer. He told me in the shop when he came in from his residence in the morning, "We will finish this job up immediately; a man has fallen through Robbins's area." I made the remark, "I don't see how a man could, because I was there yesterday." Remembering that conversation, I was satisfied that I was there that day; I was satisfied that I had been at the building the afternoon previous.

Cross-interrogatory 133. Did you tell Mr. Letz so?

Answer. I told him, says I, "I was at the building yesterday, and I did not see how any person could fall down."

251 Cross interrogatory 134. That is one big item that you recollect.

Answer. Well, that I presume is sufficient.

Cross-interrogatory 135. You say that Mr. Letz knew that a man had fallen in there the night before. What time in the morning was it that he came to tell you that?

Answer. It was about 9 o'clock—½ past 8 to 9. It was his usual time of coming down, and he told me as soon as he came in.

Cross-interrogatory 136. Were these men to work there on the Monday?

Answer. The men went down before Mr. Letz had come to the shop.

Cross-interrogatory 137. Why did they go?

Answer. Because I sent them there. I sent them there on the Monday morning before Mr. Letz had come to the shop and told me of the accident.

Cross-interrogatory 138. How many did you send on the Monday

252 morning?

Answer. I sent enough to lift the grating and put it in, and it took from four to five men; not less than four, any way

Cross-interrogatory 139. On the Monday did these men lay any grating?

Answer. I cannot say that they did, but I sent them there to do so.

Cross-interrogatory 140. You cannot recollect anything about when they laid the grating at all?

Answer. I sent them there to lay the grating at that time. I did not see them do it. I told them to go there and put in that grating, and I know they done it. They most assuredly done, it because they dare not do anything but what I had told them.

Cross-interrogatory 141. If it was not there in a month, you would be mistaken, would you not?

Answer. No. It would only be that the men had not done what I told them.

253 Cross-interrogatory 142. You would have found that out in a month, would you not?

Answer. I might possibly have found it out.

Cross-interrogatory 143. On this particular Sunday did you see any grating down there at all, either on Water street or Wells street?

Answer. I cannot say that I did.

Cross-interrogatory 144. If there had been any, you would have known it, would you not?

Answer. Well, it is possible I might have noticed it and forgotten. If there had been any at the particular place I was at, I should have noticed it.

Cross-interrogatory 145. Where were you?

Answer. At the crossing of South Water and Wells streets, on the platform.

254 Cross-interrogatory 146. On what platform?

Answer. On the stone platform; right on the crossing. There is a stone runs out at the crossing and connects.

Cross-interrogatory 147. Tell us what you mean by standing on the platform.

Answer. I mean piece of flag that runs from the sidewalk and covers the area over the building.

Cross-interrogatory 148. Do you mean to say that this stone platform was a portion of the flagging?

Answer. No, it was a separate piece of stone from the flag.

Cross-interrogatory 149. It covered the crossing?

Answer. Yes, sir; and came out so that it made a square for the area in South Water street, and that formed the end of the area on Wells street.

Cross-interrogatory 150. How big was that stone?

Answer. It was six feet, probably seven feet in the angle right in
255 the corner up to the crossing of the house.

Cross-interrogatory 151. And covered up the entire ?

Answer. Yes, it was right in the corner—a piece of stone probably in the shape of a wedge.

Cross-interrogatory 152. That stone was in, and you stood on it?

Answer. I say, probably I stood on that. I do not know exactly whether I did or not.

Cross-interrogatory 153. And you looked at it just as it was?

Answer. I looked at the hole to see if they had made any progress; but I cannot say whether there was any or not.

Cross-interrogatory 154. You stood at the corner of this stone which you say was four or five feet square?

Answer. Not square.

256 Cross-interrogatory 155. Well, of wedge-shape form. And you looked down into the thing to see if there was any work done, and if done right?

Ans. Yes, so far as I could without handling.

Cross-interrogatory 156. Can you say there was any grating in?

Answer. I cannot say there was or there was not.

Cross-interrogatory 157. If there had been, would you have been likely to have seen it?

Answer. I would probably have seen it.

Cross-interrogatory 158. Did you observe at that time whether there was any covering over this hole or not?

Answer. There was a covering over the hole, sir. How far it run I cannot tell.

Cross-interrogatory 159. On which side was it?

Answer. It was down at the lower end of it.

257 Cross-interrogatory 160. You stood at the corner?

Answer. Yes, sir.

Cross-interrogatory 161. On the corner of Wells street and South Water street?

Answer. Yes, sir.

Cross-interrogatory 162. The question is whether there was any covering over this area where your men had been to work the day before?

Answer. There might have been probably one or two sections of grating put down there, and these boards put down flimsily to close the hole. I know there was boards on there.

Cross-interrogatory 163. Then you do not recollect anything about the condition of this hole at this time?

Answer. I know the boards were on there.

Cross-interrogatory 164. Then you do not recollect whether this area was covered with boards or with grating?

258 Answer. It was not all covered with grating. I say there might have been two pieces there and I not remember it. And the boards were there.

Cross-interrogatory 165. Still, on the same principle, there might have been a dozen there?

Answer. No, there could not, because it would not hold a dozen pieces.

Cross-interrogatory 166. I want to know your best recollection of whether this whole area was covered over with boards or not?

Answer. To the best of my recollection it was, so far as that one opening went.

Cross-interrogatory 167. What opening?

Answer. I refer to the long area on Wells street. There was three openings, there. One at each store.

Cross-interrogatory 168. I am speaking of what was there.

259 Answer. There is the same now as then, but covered over with prismatic lens now; there was when I went away. I have not been to the building since I came back.

Cross-interrogatory 169. Was there any opening on South Water street or area at all?

Answer. Yes, sir; there was an area for each store.

Cross-interrogatory 170. Was there any grating or any stone laid along over the area next to the building on South Water street at the time you were there?

Answer. I do not remember whether there was any grating down or not.

Cross-interrogatory 171. Do you recollect whether there was any covering on the South Water street front or not?

Answer. I do not.

Cross-interrogatory 172. Was there a derrick there at the time you were there.

Answer. I do not remember.

260 Cross-interrogatory 173. You do not recollect a derrick?

Answer. No, sir; I do not.

Cross-interrogatory 174. You said there was some barrels there?

Answer. I thought there was some barrels there.

Cross-interrogatory 175. Where did these two barrels stand?

Answer. I cannot tell whether at the lower end or the upper end.

Cross-interrogatory 176. You cannot tell whether at the corner of Wells and South Water, or at the upper end towards Lake street.

Answer. It is my impression at the upper end towards Lake street, but I would not be positive.

Cross-interrogatory 177. Do you mean to say that that area was covered over with boards at all?

Answer. Well, boards or planks—short strips going up to the house.

261 Cross-interrogatory 178. Which way did they run?

Answer. Some one way and some another—the long boards lengthway with the opening, and the short boards up to the house.

Cross-interrogatory 179. How wide were those boards?

Answer. They were pieces of split boards and pieces of joints.

Cross-interrogatory 180. And these were laid flimsily upon it?

Answer. I rather think I said carelessly laid or something. I do not remember whether it was flimsily or carelessly. They were put there for the design of covering it up, and were considered sufficient protection.

Cross-interrogatory 181. Who put them there?

Answer. I do not know.

Cross-interrogatory 182. You do not know who put it there?

262 Answer. No. I know if any men had moved it and had not finished their work, they would have returned it to its place again.

Cross-interrogatory 183. How do you know that?

Answer. Because that was their instructions, to close up fences and such things as that, to prevent cattle getting in; anything like that, to close up all openings to leave over night in a secure manner.

Cross-interrogatory 184. You say you do not recollect whether there was any derrick there at all?

Answer. I do not.

Cross-interrogatory 185. Do you know A. B. Cook?

Answer. Yes, sir.

Cross-interrogatory 186. What is his business?

Answer. He is a stone-cutter generally; lays sidewalks, and such
263 things as that.

Cross-interrogatory 187. Was he or any of his men at work on the flagging or about that stone work on the 27th of December, 1856?

Answer. I do not know.

Cross-interrogatory 188. You do not remember the stone-cutter that you employed to widen up a portion of the flags?

Answer. We did not employ any that I know of; there was a stone-cutter there, but who he belonged to I don't know.

Cross-interrogatory 189. Then there was one there at work at that time?

Answer. On Saturday there was a stone-cutter at work.

Cross-interrogatory 190. Was that on the opening, or was it for the purpose of putting in these bulls'-eyes?

Answer. The bulls'-eyes did not go in for a long time after.

264 Cross-interrogatory 191. Do you know who put them in?

Answer. I do not.

Cross-interrogatory 192. And you are sure they did not go in for a long time after?

Answer I know they did not go in till the building was completed and the work done; and in all possibility the bill was paid.

Cross-interrogatory 193. Do you know who put in these bulls'-eyes?

Answer. I do not.

Cross-interrogatory 194. To what extent are they there? How many feet?

Answer. I do not know the number of feet. I think they occupy every place where the grating was.

Cross-interrogatory 195. Was the grating taken up?

Answer. Yes, sir.

265 Cross-interrogatory 196. When?

Answer. I do not know when.

Cross-interrogatory 197. Was there ever any grating put down there?

Answer. Yes, sir.

Cross-interrogatory 198. You are sure of that?

Answer. Yes, sir.

Cross-interrogatory 199. You are as sure of that as you are of anything about which you have testified?

Answer. I am sure that there was grating put down there.

Cross-interrogatory 200. I will ask you if you do not know that bulls'-eyes were put down there, and no grating at all?

Answer. You cannot prove it by me.

Cross-interrogatory 201. You know that grating was put down
266 there?

Answer. Yes, sir.

Cross-interrogatory 202. When was it put down there?

(Counsel for the defendant objected on the ground that the witness had completely answered before.)

Answer. I think I told you I did not know exactly the time when it was put down there; all of it completed. I apprehend you mean from the time of its being commenced to being finished.

Cross-interrogatory 203. Then do I understand you to say that from the 27th of December, 1856, these men worked right along and put it down without stopping?

Answer. Yes, sir.

Cross-interrogatory 204. Then why did you say that these men were taken off and put on other work?

Answer. Well, did not I say that they had other work about the
267 building.

Cross-interrogatory 205. You stated in your direct examination that the 28th of December was Christmas?

Answer. No, sir; I did not.

Cross-interrogatory 206. I want to know what day you said these men did not work?

Answer. The day after Christmas.

Cross-interrogatory 207. What day was Christmas?

Answer. Thursday.

Cross-interrogatory 208. What day of the month?

Answer. I presume it was the 25th; it used to be when I was a boy.

Cross-interrogatory 209. The 25th of December?

Answer. Yes, sir.

268 Cross-interrogatory 210. Then you said the men did not work the day after that?

Answer. I said they probably did not work on that day—the day after Christmas.

Cross-interrogatory 211. My understanding was that these men were Germans, and did not generally work the day after Christmas?

Answer. Yes, sir.

Cross-interrogatory 212. You say the Christmas day was the 25th of December?

Answer. Yes, sir.

Cross-interrogatory 213. Did you not state that the first time you put these men to work was on the 27th of December, 1856?

Answer. Yes, sir.

Cross-interrogatory 214. You do not recollect the names of any of
269 these men that were at work there?

Answer. No, sir; I do not remember their names.

Cross-interrogatory 214. Do you know Peter Button?

Answer. I am intimately acquainted with him.

Cross-interrogatory 215. Do you know John F. Tendleback?

Answer. Yes, sir.

Cross-interrogatory 216. What is John's business?

Answer. It is what they call a boss-mason; he lays brick and stone.

Cross-interrogatory 217. Was there any flagging down there at the time you were there?

Answer. Yes, sir; there was flagging down there.

Cross-interrogatory 218. How much?

270 Answer. All, I believe.

Cross-interrogatory 219. All the flagging was down?

Answer. I think it was.

Cross-interrogatory 220. Wer there any iron men to work at the time from New York on the building?

Answer. The day I went to put the men to work I cannot say whether there was or not, because I did not go inside the building. I did not have occasion to go there.

Cross-interrogatory 221. Do you recollect putting up any iron cornices there and shutters?

Answer. I do not think Mr. Letz put up any iron cornices.

Cross-interrogatory 222. Did he put up any iron shutters?

Answer. What kind of shutters have you reference to—rooling shutters?

Cross-interrogatory 223. Any kind?

Answer. I cannot say that he did; he did not put up any rolling shutters.

271 Cross-interrogatory 224. Then you do not know what kind of contract or what extent of contract it was?

Answer. I believe I explained that contract.

Cross-interrogatory 225. That it was a mere order given by Mr. Robbins?

Answer. It was, as I understood a contract.

Cross-interrogatory 226. Who gave this order to Mr. Letz, if you know?

Ans. I cannot tell you any further than what is the general rule.

Cross-interrogatory 227. Now you said that Mr. Letz had an order from somebody. Who gave the order to Mr. Letz?

Answer. It cannot be expected that I can tell you that; I do not know how he got his authority, unless from the architect after the job was let.

Cross-interrogatory 228. How was it in regard to this job? Do you know?

Answer. I told you I did not know who gave the direct order.

272 Cross-interrogatory 229. Then you do not know who gave the order to Mr. Letz for the doing of this iron work?

Answer. No, sir.

Cross-interrogatory 230. All that you know is that the pins, and so forth, were charged to Mr. Robbins?

Answer. Yes, sir; and the grating too. The pins were necessary to hold the grating.

Cross-interrogatory 231. And you put them on the books?

Answer. I charged them on the books to Allen Robbins.

By Mr. Kales: Interrogatory. And they were put on the building?

Answer. They were put on the building. Their private arrangements I had nothing to do with. I received my orders from Mr. Letz, and it was my duty to do whatever he ordered me.

273 By Mr. Anthony: Cross-interrogatory 232. These loose boards and joists you say were laid right on the surface?

Answer. They were laid on a line above the sidewalk; they could not be on a level with it. They were above, as a matter of course. They would have to run one end on the sidewalk.

Cross-interrogatory 233. You do not recollect about this derrick?

Answer. I do not. I was not there for that purpose; but if I had stumbled over it I probably should have remembered it.

Re-examined by Mr. Kales.

Interrogatory. State whether these boards covering the area were put down in a substantial manner or not.

(Objected to by plaintiff's counsel as leading.)

Answer. I don't know what you would call a substantial manner.

274 Interrogatory. What was the condition of the joists and boards covering the area, with reference to bearing up, for supporting persons passing, or who might pass, upon a crossing them? State as fully as you are able according to the best of your remembrance and belief.

(Objected to by plaintiff's counsel, first, as having been already explained by the witness; and second, as being leading.)

Ans. Well, to the best of my knowledge, that covering over that area would sustain about the weight of one man, but I do not think it would sustain the weight of two at a time in one spot.

Recross-examined by Mr. Anthony.

Cross-interrogatory. I understand you to say that these joists were laid apart from each other?

Answer. They were separated from each other a littler closer at one end than at the other, in the length of the joist, and some of the boards laid up to the house.

W. H. CHENOWETH.

After the signing of the deposition by the said witness Mr. Anthony, attorney for the said plaintiff, put the following cross-interrogatories, on this 23d day of May, A. D. 1864, which, being submitted to the inspection
275 of Mr. Kales, attorney for defendant, it was agreed by him should be admitted as part of this deposition, he not wishing to ask any further questions.

Int. Did you at the time you were the foreman of Mr. Letz, as stated by you, speak the German language?

Ans. I did not speak the German language fluently, but I spoke it sufficiently to make the men understand; it was a kind of "gibberish" more than anything else. I would not understand a conversation that was going on between two Germans unless I knew that they were talking about work about the shop; if I knew the subject that they were talking about, I would understand it.

Int. If the workmen there under you were all Germans, as you have stated, and you did not speak the German language, how could you direct them to go to a distant portion of the city, as Robbins's building is from Letz's shop, and do a job of work?

Ans. The leading hands in the shop could all speak English; some well, others not quite so well. I would direct the men that could speak English.

Int. You have stated in your examination that you did not know
276 and could not recollect any of these men that you sent down there to work on this grating. If that is so, do you know whether those men could speak the English language?

Ans. I presume so from the habit that I always had of putting one that could speak the English language, and at the same time was a good workman; I do not recollect that there was any one of these men that could speak the English language.

W. H. CHENOWETH.

UNITED STATES OF AMERICA, *Northern District of Illinois:*

I, L. Proudfoot, a commissioner duly appointed by the circuit court of the United States for the northern district of Illinois, under and by virtue of certain acts of Congress, do hereby certify that the reason for taking the foregoing deposition is, and the fact is, that the witness above named is material and necessary in the cause in the caption of the said deposition named, and that the said deposition is taken by agreement of the attorneys for the respective parties to said suit, and all objections as to the manner of taking and certifying the same are waived.

I further certify that on the 19th day of May, in the year of our Lord eighteen hundred and sixty-four, I was attended by the attorneys for
277 the respective parties to said suit and by the said witness, who is of sound mind and lawful age, and the said witness was by me first carefully examined and cautioned and sworn to testify the truth, the whole truth, and nothing but the truth in the cause aforesaid; and the deposition was taken down in short-hand by Mr. George Bulkley in my presence and in the presence of the said witness and from his statement, which said deposition was subsequently written out by said George Bulkley, and was by me read over the said witness, and he subscribed the same in my presence. I have retained the said deposition as written out by said George Bulkley in

my possession for the purpose of delivering the same with my own hand open into the court for which the same was taken. And I do further certify that the deposition of this witness was taken as above set forth by agreement of the attornies for the respective parties hereto, and all objections as to the manner of taking the same are waived; the question of competency of said testimony to be submitted to the court. And I do further certify that I am not of counsel nor attorney for either of the parties in the said deposition and caption named, nor in any way interested in the event of the cause named in the said caption.

278 In testimony whereof, I have hereunto set my hand and seal this 23d May, 1864.

[SEAL.] L. PROUDFOOT, *U. S. Commissioner.*

Endorsed: Filed July 7th, 1864.

WM. H. BRADLEY, *Clk.*

279 Upon the reassembling of the court, at 2 o'clock p. m., defendant, by his counsel, Kales, tendered in evidence the record of the testimony of James S. Speed as included in the bill of exceptions in this case. The testimony of James S. Speed, as above, was then read in evidence as follows:

Col. Speed sworn:

I was contractor in 1856 under sewerage com's; I laid sewers on south side and on Wells street; I went to Robbins to get a contract with him; he said he had nothing to do with it; I was there from November to December; the street was all hurlyburly arrangements for putting down Nicholson pavement, street not used; the flagging was down, and it was the only place to mix cement; asked permission of R.; he said he had nothing at all to do with it; referred me to some gentleman, who gave me permission; the area was kept covered with plank and joist; it was protected; sometimes they took my planks, and when I wanted them I took them; there were barrels there, and barriers; the building was unfurnished.

Cross-examined.

I finished work there in December some time; don't know as to the condition of the sidewalk after I stopped work there; the iron men were there putting up the iron railing.

280 Defendant, by his counsel, tenders proof as follows: That he let the work, covering the space between the building and the curb walls supporting the roadway of the street, and the sidewalk over the coal vaults, and the covering over the area in conformity with the ordinances of the city, to competent and skilfull contractors, who, at the time of the alleged injury to William H. Woodbury, now in possession of the premises and prosecuting their work by themselves and subcontractors without the direction of defendant, and that the latter had no knowledge of the manner in which the contractors were doing their work.

The court, (Davis, J.) We understand that point has been directly settled in this very case. It will be overruled.

To which ruling of the court, in refusing to allow the introduction of the proof tendered, defendant, by his counsel, did then and there except.

The examination of Judge Wilson was for the time being postponed, and plaintiff called Walter Kimball to explain his testimony as follows:

I stated in answer to an inquiry by Mr. Fuller, the other day in my testimony, that the order entered on the twenty-fourth (24th) June in the

281 case of Woodbury versus the city of Chicago, when the judgment was entered, was the last order entered in the case. Upon examin-

ing the record, I discovered on the thirtieth (30) of June there was another order entered which I had not seen that morning, and this is a certified paper of that order entered on the thirtieth (30) June. I wish to correct my testimony in that regard. On the 30th June this order was entered: "William H. Woodbury versus the city of Chicago. And now comes the said defendant, by Miller, attorney for said defendant, and prays an appeal to the supreme court of the State of Illinois, which is allowed by the court on the said defendant's filing, within ten days from this date, an appeal bond in the sum of twenty-five thousand ($25,000) dollars, with security, to be approved by the judge of this court."

By Mr. Anthony: Q. You have examined your minutes that you made at the time?

A. I have.

Q. Do they correspond to that record?

A. They do; the book is here in court.

Cross-examination by S. W. Fuller, esq.

Q. Was that appeal prosecuted?

A. I believe not; I think there was no appeal bond filed in the case.

Q. Was any record of it furnished by you to the supreme court?

282 A. Not that I remember of. I don't think I ever made a record of the case. I have my minutes here of that, if it is necessary to read them.

Q. The minutes of the 24th?

A. Of the 30th and 24th both.

By Mr. Anthony: Q. Will you read the entry?

A. June 24th, motion for a new trial and arrest of judgment overruled; exception by defendant; judgment enters. Then 30th, appeal prayed to the supreme court for defendant, allowed on filing bond to be approved by judge of court, ten days, in twenty-five thousand (25,000) dollars. Those are all the minutes.

Defendant now offers John M. Wilson as a witness.

The defendant then called John M. Wilson, a witness, being duly sworn was examined, and testified as follows:

Q. Were you judge of the Cook County court of common pleas in 1857?

A. Yes, sir.

Q. Sole judge?

A. Yes, sir.

Q. Do you remember the case of William H. Woodbury against the city of Chicago, prosecuted in your court during this year?

A. Very well, sir.

Q. Was the case tried before you?

283 A. Yes, sir.

Q. Do you recollect that motion in arrest of judgment and for a new trial having been made, and being passed on by the court? Do you remember of the pendency of the motion for a new trial, and in arrest of judgment in the suit of Woodbury against the city of Chicago?

A. I do.

Q. State whether at the time said motion was disposed of, the attornies for the respective parties were present in court?

The court, (Davis, J.) Let defendant's counsel write the question down which he desires to put to Judge Wilson, and then let the answer be written down and submitted to the court.

Whereupon defendant, by his counsel, propounded the following interrogatory, in writing, to witness:

Q. Do you remember the pendency of the motions for a new trial, and in arrest of judgment in the suit of Woodbury *vs.* city of Chicago? If yea, state whether at the time said motions were overruled, the attorneys in that suit were present and who they were; and state what was said to the court on that occasion, as to the disposition of said suit, by the attorney of the city. State what advice you received from the attorney of said city touching the disposal of said motions, and what took place in that behalf.

284 To which interrogatory witness submits the following response, in writing:

A. I recollect the pendency of the motions. My best recollection is that both parties were represented by attornies J. C. Miller for the city and L. D. Wilkinson for the plaintiff. I have no distinct recollection of what was said by the city attorney. I have only a general impression that the order made was in conformity to the wish expressed by city attorney, without argument.

To which interrogatory and the response thereto plaintiff, by its counsel, objected.

The court held that it could not be received, on the ground that it is immaterial; to which ruling of the court the defendant then and there excepted.

The case rested. The case was argued to the jury.

The defendant asked the court to give the following instructions and each of them.

The court, (Davis, J.) I would remark, in relation to the first four instructions asked by defendant, that the court has embodied its view in relation to them in its charge; as to the fifth, this is refused, because there is no evidence on the subject. It is right in the abstract.

Viz: 1. The jury are instructed that under the evidence in this case the defendant is not liable to the plaintiff as for making or causing a
285 nuisance, as it appears from the evidence in this case that the open space around this building, enclosed by it and the curb wall, was caused by the joint act of the plaintiff and the defendant.

2. The plaintiff is bound to prove its allegations of the manner of making or causing the open space between defendant's building and the curb wall; and unless they believe from the evidence that space was made in the manner stated in plaintiff's declaration, they will find for the defendant.

3. If the jury believe from the evidence that the space around the defendant's building, enclosed by it and the curb wall, was made by building the curb wall in the manner and to the height directed by the proper officers of the city of Chicago, as detailed in the evidence, they will find for the defendant.

4. The jury are instructed that under the evidence in this case the record and proceedings in the suit of Woodbury against the city of Chicago are not conclusive upon the defendant unless the jury believe from the evidence that some one, on behalf of the city of Chicago, notified defendant of the pendency of the suit of Woodbury against the city of Chicago, with a view of giving defendant an opportunity of defending it, and of holding de-
286 fendant liable to the city for the result of that suit, then the record and judgment in that case are not binding upon the defendant.

5. The jury are instructed that the city of Chicago was bound to defend the suit of Woodbury against the city of Chicago in good faith and with reasonable diligence, and unless they believe from the evidence it was so defended, then the record and judgment in that suit are not binding upon the defendant in this case.

But to give the same, or either of them, the court then an there refused, for the reason above stated by the court; to which several rulings the defendant then and there excepted.

The court instructed the jury as follows:

GENTLEMEN OF THE JURY: This suit is brought to recover from the defendant the amount of a judgment which it is alleged the city was forced to pay to one William H. Woodbury. Woodbury sued the city because an area near the corner of South Water and Wells streets was left open and unguarded, so that on the night of the twenty-eighth (28) of December, 1856, while passing along the street, he fell into it and was injured. At the June term, 1857, of the Cook County court of common pleas a judgment was rendered against the city and in favor of Woobury for fifteen thousand (15,000) dollars and costs of suit, which the proof shows the city has paid.

287 The law is that although the city is primarily liable for an injury suffered by reason of the dangerous condition of the streets and sidewalks, yet the corporation has a remedy over against the party that is in fault, and has so used the streets and sidewalks as to produce the injury.

The question, then, for you to determine is, whether Robbins is answerable to the city for the judgment recovered by Woodbury. If it was through the fault of Robbins that Woodbury was injured, he is concluded by the judgment recovered against the city, if he knew that the suit was pending and could have defended it.

It is not necessary that the city should have given him an express notice to defend the suit, nor is it necessary that the city should have notified him that it would look to him for indemnity.

If Marsh, the attorney for the city, told him of the pendency of the suit, what it was for; told him of the day of the trial, and talked to him about the testimony of a witness, he is as much chargeable with notice as if he had been directly told that he could contest Woodbury's right to recover and that the city would look to him for indemnity. It is not requisite that Marsh should have informed him that he was city attorney. If Robbins knew the fact (which he testifies to) he did not need to be informed of

288 it. It is urged by the counsel for the defendant that Robbins did not know, and was not informed by Marsh, in what particular court the action was pending, and had not, therefore, such knowledge as would charge him. In the opinion of the court this was not necessary. When Robbins was told Woodbury had sued the city for falling into an area which he had built, then it was his duty to have instituted an inquiry and ascertained in what particular court the action was to be tried

It is also claimed that the city was guilty of negligence, because Marsh, the attorney, used no means to procure the testimony of a witness named to him by Robbins, whose testimony, if procured, would have tended to a reduction of damages.

If Robbins knew that the suit was in court, he cannot claim exemption because the city did not defend the suit as vigorously as he would have done. It was his privilege to appear and defend, and as much his duty as it was the duty of the city to produce the witness for examination. It makes no difference in this case that at the time of Woodbury's suit, the city and Robbins were in ignorance of their respective rights and liabilities.

Was it through the fault of Robbins that the accident to Woodbury happened? For the city must be reimbursed if the injury were the result

289 of the fault of Robbins, unless it has been itself in fault. It is conceded that Robbins was the owner of the lot on the corner of South Water and Wells streets, and was engaged in erecting a large and valuable bui'ding, and that he caused to be constructed as appurtenant to said building, and for its convenience and accommodation, an area next to said building. The building was commenced in the spring of 1856. The grade of Wells street had been ordered to be raised by the city, but was not actually

raised until the summer of 1856. There is testimony tending to show that when Robbins removed the old sidewalk, which was on the natural surface of the ground, he removed very little earth in order to make this area. There is also testimony tending to show that what earth he did remove was replaced by sand and other materials, and it is contended that although he might be liable if there were proper allegations in the declaration, yet he is not liable in this suit, because the declaration says that he wrongfully and unjustly dug a large hole or pit, and the digging, if any was done, did not contribute to produce the injury. But if the declaration charges him with digging a large hole or pit, it also charges him with opening and making one, and in the opinion of the court it is immaterial whether the area
290 was made by excavating the earth as stated by some of the witnesses or in the manner mentioned by Mr. Button, the contractor. Robbins was not in fault in making the area so as to conform to the grade of the city, and the city was not in fault in permitting him to build it. Robbins had the implied license of the city to build the area, but no license can be presumed from the city to leave the area open and unguarded. If the city had given him an express license to leave the area open, or had undertaken to build the area itself, then Robbins would not be in fault.

But this is not contended. The fact that Robbins was building the area at the same time that the city was grading the street does not excuse him or show that the city was in any degree delinquent. Robbins impliedly agreed with the city that if he were permitted to build the area for his own benefit, he would do it in such a manner as to save the public from danger, and the city from harm. The gravamen of the offence here is not that Robbins was engaged in an unlawful work when he made the area, but that he left uncovered and unprotected an area which was dangerous, and which, if left without guards to warn those who passed by, became a nuisance; what was originally lawful thereby became unlawful. The city cannot be held
291 under any obligation to supervise the building of an area like this, under the circumstances detailed in the evidence.

If the jury believe from the evidence that this area was built under the direction of Robbins and for his benefit, and that it was left unprotected, and that Woodbury, while passing along the street, fell into it and was injured, then the jury will find the amount Woodbury recovered against the city, with interest.

If the jury also believe that Robbins knew of the pendency of the suit of Woodbury against the city, and had the opportunity of defending it, Robbins's duty was absolute to see that the area was safely and securely guarded, and he is not excused because he was sick and could not in person attend to it.

Whereupon, to so much of the charge as related to the notice to Robbins of the pendency of the suit of William H. Woodbury against the city of Chicago, and to so much of the charge as related to the construction of the area, defendant, by his counsel, then and there entered his exception.

292 And forasmuch as the said several exceptions taken and shown hereinbefore do not appear of record in this cause, the same are hereby severally allowed by the court, and hereby made a part of the record in the said cause.

DAVID DAVIS. [SEAL.]
THOMAS DRUMMOND. [SEAL.]

Endorsed: Filed July 21st, 1864.

WM. H. BRADLEY, *Clerk.*

293 On this day, to wit, the twenty-sixth day of July, in the July term of said court, A. D. 1864, in the record of the proceedings of said court in said entitled cause is the following entry, to wit:

THE CITY OF CHICAGO
vs.
ALLEN ROBBINS } Trespass on the case.

Now come the parties, by their attorneys, and the plaintiff's attorney calls up the motion of the defendant heretofore entered herein by his attorney for a new trial of this cause, and in arrest of judgment, which motion is overruled by the court. It is thereupon considered and adjudged by the court that the said plaintiff do have and recover of the said defendant the said sum of twenty-one thousand five hundred and fifty-one dollars and seven cents, its damages so as aforesaid assessed, together with its costs and charges by it about its suit in this behalf expended, amounting to the sum of dollars and cents, and that it have execution therefor.

294 On this day, to wit, the twenty-eighth day of July, A. D. 1864, came the said defendant, by his attorneys, and filed in said clerk's office in said entitled cause his appeal bond, which is in the words and figures following, to wit:

Bond.

Supreme Court of the United States.

ALLEN ROBBINS, plaintiff in error,
vs.
THE CITY OF CHICAGO, defendant in error.

Know all men by these presents that we, Allen Robbins, of the city of Chicago, in the county of Cook and State of Illinois, and Zenas Cobb, and John A. Yale, of the same place, are held and firmly bound unto the above-named the city of Chicago in the sum of twenty-seven thousand dollars, to be paid to the said the city of Chicago; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents. Sealed with our seals, and dated this
295 twenty-eighth day of July, in the year of our Lord one thousand eight hundred and sixty-four.

Whereas the above-named Allen Robbins hath prosecuted a writ of error to the Supreme Court of the United States, to reverse the judgment rendered in the above-entitled suit by the circuit court of the United States for the circuit and northern district of Illinois:

Now, therefore, the condition of this obligation is such that if the above-named Allen Robbins shall prosecute his said writ of error to effect, and answer all damages and costs if he shall fail to make good his plea, then this obligation shall be void; otherwise, the same shall be and remain in full force and virtue.

ALLEN ROBBINS. [SEAL.]
ZENAS COBB. [SEAL.]
JOHN A. YALE. [SEAL.]

Sealed and delivered in presence of.

296 Endorsed: The within bond with Messrs. Zenas Cobb and John A. Yale as sureties will be satisfactory.

FRANCIS ADAMS, *City Att'y.*

Approved.

THOMAS DRUMMOND.

Filed July 28th, 1864.

WM. H. BRADLEY, C[illegible]

297 NORTHERN DISTRICT OF ILLINOIS:

I, William H. Bradley, clerk of the circuit court of the United States for the northern district of Illinois, do hereby certify that the foregoing is a true and complete copy of the record and all the proceedings had in the cause wherein the city of Chicago is the plaintiff and Allen Robbins is the defendant, as the same appears from the original papers in said cause and the records of said court now in my custody and control.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court, at my office, in Chicago, in said district, this sixth day of December, in the year of our Lord one thousand eight hundred and sixty-four, and of our independence the eighty-ninth year.

[SEAL.] WILLIAM H. BRADLEY, *Clerk.*

298 UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

The United States of America to the judges of the circuit court of the United States for the northern district of Illinois, greeting:

Because in the record and proceedings, as also in the rendition of a judgment, in a plea which is in the said court before you, between the city of Chicago, and against Allen Robbins, a manifest error hath happened, to the great damage of the said Allen Robbins, as by his complaint appears, and it being fit that the error, if any there hath been, should be duly corrected and full and speedy justice done to the party aforesaid in this behalf, you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the first Monday of December next, in the said Supreme Court, to be then
299 and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein, to correct that error, what of right and according to the law and custom of the United States should be done.

Witness the Hon. Roger B. Taney, chief justice of the Supreme Court of the United States, this twenty-seventh day of July, in the year of our Lord one thousand eight hundred and sixty-four, and of our independence the eighty-ninth year.

[SEAL.] WM. H. BRADLEY, *Clerk.*

300 UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

To the city of Chicago, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, on the first Monday in December next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the seventh circuit and northern district of Illinois, wherein Allen Robbins is plaintiff in error and you are defendants in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness Thomas Drummond, judge of the district court, and ex officio one of the judges of the circuit court of the United States, this 28th day of July, in the year of our Lord one thousand eight hundred and sixty-four.

THOMAS DRUMMOND.

Chicago, July 28th, 1864.
Filed December 10, 1864.

SUPREME COURT OF THE UNITED STATES,

DECEMBER TERM, 1866,—Case No. 132.

GEORGE A. ROBBINS, Ex'r, Plaintiff in Error,

v.

CITY OF CHICAGO, Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR.

F. H. KALES, OF COUNSEL.

SUPREME COURT OF THE UNITED STATES.

GEORGE A. ROBBINS,
Executor, etc., Plaintiff in Error.
vs.
CITY OF CHICAGO,
Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR.

The cause is here for a second time on error. In this case, as reported in 2 Black, 418, it appeared that Robbins, under an implied license from the city, entered into a portion of the public street, and there made and excavated an area appurtenant to his building; that while the excavation was going on, and before that portion of the street was restored to the public in its former condition and usefulness, Woodbury, in passing along the street, fell into the opening and was injured; that he sued the city and recovered damages; that Robbins had notice of the pendency of the suit and could have defended; and that Robbins, although he had let the work, was liable to the city, because he was in the street under an implied license, which bound him absolutely to save the public from danger and the city from harm; and that he was concluded, by the recovery in the suit against the city, of which he had notice.

The facts now presented by the record are essentially different from those in the former record; and in so far as the difference is material, we desire to present the same for the consideration of the court.

It now appears that Robbins, instead of entering under an implied license to construct an area, entered upon the street by express authority of the statute, giving him that right, *to relay* an old sidewalk, a public improvement at that time required for the public use in front of his lot, and then authorized by the ordinances: that the city itself, by improving a portion of the street, had created a public necessity for the rebuilding of this sidewalk prior to its construction; that the *pit* into which Woodbury fell was the immediate result of constructing the sidewalk in conformity with the plan for sidewalks prescribed by the Common Council; and that the area which it is alleged Robbins made, consisted of this *hole* or pit, which was converted into an area by flagging the bottom, plastering the sides, and putting in partitions, underneath and below the permanent covering of the sidewalk, required to be relaid at the new grade. It also appears that Robbins let the work of relaying the sidewalk to skillful contractors, who at the time of the accident had possession and exclusive control of it, and that he knew nothing of its situation at that time; that at the time of the accident the servants of the contractors were laying the prismatic iron covering: but being obliged to suspend work over Sunday, and not having fully completed the permanent covering, they left the unfinished portion with a temporary covering of boards, through which Woodbury on Sunday evening fell into the pit, beneath the sidewalk.

To state the facts more fully: it appears that in March, 1855, the City Council, with a view to a general system of public improvements, comprehending a plan of sewerage and the raising and paving of the streets and the relaying of sidewalks, passed an order fixing the grade of the streets and sidewalks at this place at about ten feet above the level of the Chicago river, and nearly seven feet above the natural surface of the ground, or level of the old streets. In the month of February, 1856, following, Robbins, being then the owner of a vacant and unimproved lot on the southeast corner of Wells and Water streets, designed, planned, and let out to contractors the erection of a building on his lot: and also the construction of a sidewalk to correspond with the new carriage-ways of these streets, then about to be raised to the grade and paved.

In making these improvements the city authorities required

him, in his plans, to conform to the newly ordered grade, and he did so. It does not appear that any time was specified in the contract at which the contractors were to commence building the sidewalk; but they actually commenced to build it about the time the city commenced, a few rods north, to fill the carriage-ways of Wells and Water streets with earth to bring them up to the grade previously ordered by the city. The filling of the street by the city commenced at the abutments of the Wells street bridge — another public improvement then in process of construction — and was continued south, past Robbins' lot towards Lake street. Before the work of filling reached Robbins' lot, Button (one of his contractors,) who had obtained a written permit from the city authorities to occupy a portion of the street, commenced to build a curb wall on the dividing line between the carriage-way and the sidewalk opposite the lot. In May this wall was so far completed that the city was able to and did fill the carriage-way with earth against the wall. At the same time Button constructed an inner wall towards the building, and about four feet therefrom. In the meantime the City Superintendent, who had in charge the Wells street bridge improvement, deeming the new grade not sufficiently high between Lake street and the bridge, to give an easy approach thereto, ordered the grade to be raised about nine inches more, as he had authority to do; this was done sometime in October, 1856, and rendered a change in the height of the sidewalk necessary. The curb wall was thereupon brought up to the additional grade, by the direction of that officer: and about the same time the inner wall was carried up to correspond; the carriage-way was then raised by the city to meet the views of the City Superintendent, and the contractors of Robbins commenced to lay a portion of the permanent covering of the sidewalk; and from October until December the city, at this place, was putting in the sewers, and filling to the necessary grade, and paving the carriage ways of both Wells and South Water streets. After the stone flagging was laid, and before the contractors, to lay the residue of the covering, consisting of prismatic iron grating, had entered to complete the permanent covering, the City Superintendent ordered a temporary covering to be put over this unfinished portion; with which direction the contractors of Robbins complied: and this remained until a few days before the

accident, when the contractors entered to finish the work; and on Sunday evening, the 28th of December, 1856, while this part of the work was in their hands, Woodbury fell through an opening carelessly left by their servants, or through the temporary covering ordered by the City Superintendent, and was injured. At this time Robbins was sick, at the Tremont House, and knew nothing personally of the condition of the sidewalk.

The plan on which Robbins contracted for the building of the sidewalk, and which it is claimed was in conformity with that ordained by the Common Council, consisted of a curb-wall carried up to the height of the grade; an inner wall to correspond, both about seven feet high from the bottom of the old sidewalk, and a covering at grade of a given width resting on these walls for support, and extending the whole width of sixteen feet from the walls of the building on the lot to the outer edge of the curb-wall; this covering as contracted for, and as put down, consisted of stone flagging for eleven feet and two inches of the width, and prismatic iron covering for the residue of four feet and ten inches. It was proved that the sidewalk was constructed according to the plan and of the width and materials specified in the contract therefor, made by Robbins.

This plan conformed to that ordained by the Common Council.

It was shown by the ordinances that the curb-wall, and the height of it, as well as the width of sixteen feet, were expressly authorized and required. It was also shown by evidence that the inner wall was a usual and necessary support for the covering, since the covering could not rest alone on the curb-wall situated on the outer edge of the sidewalk. An inner wall, as a support to the covering, located somewhere between the curb-wall and the lot, was indispensable, and therefore authorized by the ordinances. After proving that Robbins had let this work to contractors, and that they had executed the same according to the letting, evidence was tendered on his part to show that he let the work of this covering in conformity with the ordinances of the city, and that he let it to skillful contractors, who at the time of the accident were in possession of the premises, prosecuting the work by themselves and sub-contractors, without the direction of Robbins; and that the latter had no knowledge of the manner in which they were doing the

work. The evidence so offered was excluded by the court, and an exception taken. Had this evidence been admitted, complete confirmity to the plan of sidewalk prescribed by the Common Council would have been shown. So far then, as such conformity is material on the trial here, it must be taken to have been established in the court below. It is then shown that every part of this sidewalk was in conformity with the city ordinances.

But there was a hollow space thereunder. In relation to that, there must necessarily have been a hole under the sidewalk when relaid on a raised grade, unless the ordinances required the space between the curb-wall and the building to be filled up to the grade; but the ordinances did not require such filling; and therefore in providing for the sidewalk, Robbins was authorized to leave the space unfilled, whether he contemplated making any use of it or not. The space, or pit, into which Woodbury fell, resulted directly from the execution, in the ordinary way, of the plan ordained by the city, and was caused by an adherence thereto. The area was nothing more than this hollow space, or pit, fitted for use; but it was not rendered more dangerous as an area than it was as a hole, unconverted into an area. The hole itself, was the dangerous thing; and the liability to accident therefrom arose out of the fact that in putting on a covering to complete the sidewalk there must necessarily be a time, longer or shorter, that it would remain uncovered, or only with a temporary covering, such as was ordered by the City Superintendent.

In the next place, the public interests required the building of the sidewalk at the time it was in process of construction. The city at that time was raising the carriage-ways of Wells and Water streets, and the effect of this improvement, if nothing else were done, would be, at Robbins' corner to leave the surface of the old sidewalks on Wells and Water streets, far below the carriage-ways; thus causing a vacant space, or pit, sixteen feet wide and about seven feet deep around Robbins' building on both streets; thereby practically putting the old sidewalks out of public use by obstructing their passage-ways at the street crossings, at the intersection of the raised carriage-ways of the streets, near the corner of the building. This would cut off the passage-ways formerly leading across both streets at this point, unless the old

sidewalks were relaid at the new grade. It appears then, not only that the relaying of the old sidewalks was necessary, but that the city itself created a public necessity therefor.

It is admitted that this necessity was not caused by any wrongful or illegal act of the city; but nevertheless its action in the premises, although lawful, created a duty on its part towards the public, in relation to the sidewalk portion of the street.

If the public interests required the rebuilding of these sidewalks at the time the work was done, the legal right to rebuild them was in Robbins; and he had lawful authority to enter on the street for that purpose.

The provisions of the city charter and ordinances then in force applicable to this part of the case, are —

Paragraphs 30 and 54 of Sec. 4, Chap. 4 of the Charter (Mun. L., pp. 23 and 26) vesting exclusive control over sidewalks in the Common Council.

Sec. 1, Chap. 7, (Mun. L., p. 38) giving power to the Common Council to grade and pave the streets and cause sidewalks, private drains, etc., to be constructed, relaid, etc.

Sec. 2, Chap. 7, (id. p. 38) providing a different mode of defraying the cost of sidewalks, from that provided in relation to grading and paving the carriage-ways.

Sec. 10, Chap. 7, (id p. 40) providing that: "All owners or occupants in front of or upon whose premises the Common Council shall order and direct sidewalks or private drains to be constructed, repaired, relaid or cleansed, shall make, repair, relay, and cleanse the same at their own cost and charge, in manner and within the time prescribed by ordinance *or otherwise;* and if not done in the manner and within the time prescribed, the Council may cause the same to be constructed, repaired, relaid, etc., and assess the expenses upon such lots and collect the same."

Sec. 13, Chap. 3, Charter, (Mun. L., p. 15) making it the duty of the Street Commissioners to superintend all local improvements in their respective divisions.

Sec. 14, Chap. 53, of Ordinances (Mun. L., p. 399) providing that "whenever any sidewalk shall require to be relaid" in whole or in part, that the Street Commissioner shall by written or verbal notice direct the owner to proceed with the work,

provided that in case where it shall be necessary wholly to rebuild the sidewalk, not less than ten days' notice shall be given, and if the notice is not complied with by the owner of the lot, that then the Street Commissioner shall have the work done, and such proceedings shall be taken as are provided to charge the expense on the lot agreeably to the charter.

Sec. 1, Chap. 27, of the Ordinances, (Mun. L., p. 231,) fixing the grade at this place; and sec. 13, chap. 53, (Mun. L., p. 399,) requiring all persons building sidewalks, under penalty, to conform to the grade established.

Art. 2, Sec. 2, Ch. 27, (Mun. L., p. 241), and Sec. 1, Chap. 53, (id. 393), authorizing a curb-wall and establishing the width of the sidewalk.

Thus it will be seen that by Sec. 10, Ch. 7, Charter (*supra*), the owner had the right to build or relay a sidewalk, when the building or relaying of it was ordered by the Common Council; by Sec. 14, Chap. 53, of Ordinances (Mun. L., p. 399), the Common Council, in pursuance of the section of the charter last above cited, ordained that "whenever any sidewalk *should require to be* wholly *relaid*," that the Street Commissioner should notify the owner verbally or in writing; and that the owner should do the work within the time prescribed; and in case he did not, the Street Commissioner should do it and report the expense to the Common Council, to be collected from the owner or out of his lot.

By this section of the ordinance, *every* sidewalk in the city, as often as it should require to be relaid, was expressly ordered by the Common Council; the only prerequisite contemplated by the ordinance was, that the relaying should be required by the public interests.

Here was a statutory right in the owner to relay the sidewalk; and the ordinance directed the owner to relay it when necessary to the public convenience and accommodation; and further conferred on the Street Commissioner the authority to compel the owner to exercise the right, or, after a reasonable time, be deprived of it; and when thus deprived of this right, and not before, the city authorities could do the work as provided in the charter and ordinances, and charge the owner's lot with the expense.

When the relaying of any existing sidewalk should actually

become a public necessity, the failure of the Street Commissioner to notify the owner to proceed with the work would make no difference with the owner's right to proceed. The object of notice to the owner, under such circumstances, was not to confer the right, but to terminate it, in case it was not exercised within a reasonable time.

But if any order was necessary on the part of the city, then inasmuch as the relaying of the sidewalk was demanded by the public interests, and the city was primarily bound to the public to keep its sidewalks in a passable and proper condition, it was its duty to have caused the order to be made. The rule here applies, that where a public body is clothed by statute with power to cause an act to be done which is required by the public interest, and the means of doing it are under the control of the corporation, it is in duty bound to exercise the power and cause the act to be done.

Weightman v. *Corp. Washington*, 1 Black, 39.
People v. *Corp. Albany*, 11 Wendell, 540, 543.
Mayor, etc., v. *Furze*, 3 Hill, 612.
Wilson v. *Mayor*, 1 Denio, 601.
Hutson v. *Mayor*, 5 Seld. 163.
Browning v. *City of Springfield*, 17 Ill. 143.

And more especially is this the rule, where a public necessity for the performance of the act is created by some other act, however lawful, of the corporation itself.

Barton v. *City of Syracuse*, 37 Barb. 292.
Mills v. *City of Brooklyn*, 32 N. Y. 489.
Rochester White Lead Co. v. *City of Rochester*, 3 Com. 463.
Goodrich v. *City of Chicago*, 20 Ill. 445.

But in the absence of evidence to the contrary, the Court, under the circumstances, is bound to presume that the city, through its proper officers, gave the order to Robbins or to his contractors to proceed with the work. And this presumption has additional force when applied to the Street Commissioner, whose duty it was to have given the notice to Robbins to relay the sidewalk A breach of duty on the part of the city or its officers will scarcely be presumed in order to enable it, by that

presumption, to place Robbins in a worse position in relation to his right to enter upon the street, than he would have occupied had the city performed its duty by giving him notice to proceed.

It may be claimed that Robbins is not entitled to the benefit of the statutory authority, because he made his contracts before the city had created a necessity for a sidewalk; but the circumstances of this case afford a sufficient answer to this position.

The city had previously fixed the new grade of the streets and sidewalks at this place; and was itself about to fill up and pave the carriage ways and put in sewers; the city authorities, as Robbins testifies, required him in the erection of his building to conform to the new grade; and he must have known and had opportunity to know of the proposed raising and paving of the carriage-ways at the time he contracted for the erection of his building. He also knew that the filling of the carriage-ways would leave the old sidewalk far below the surface of the improved street; that a hole of great depth at this place would be thus produced; and that the public interests would require the old sidewalk to be wholly rebuilt at the new grade. He also knew that the city and its proper officers were bound, in duty to the public, to cause it to be rebuilt, contemporaneously with the improvement of the residue of the street. And having the first right to build it when necessary, he contracted to have the sidewalk rebuilt in the usual mode and in conformity with the city ordinances; but fixed no time by contract or otherwise for the commencement of the work, from which it could appear that he contracted for rebuilding the walk before the public interests should require it to be relaid. The time of making the contract, when considered with reference to the time the necessity for the relaying would occur, only shows that Robbins intended to build the sidewalk when the public interests required it; because it would reasonably require the intervening time to procure the materials. There is nothing in the case therefore to show that Robbins intended or attempted the relaying of the sidewalk by virtue of any other than his statutory authority.

He, by his contractors, was in as of right, and not by virtue of a license, express or implied. For it is essential to the existence of a license, that the act done would be an invasion of

the rights of another, or of the public, and to that extent unlawful, without the procurement of the license. But here the public interests required the sidewalk to be relaid; when so required, Robbins had the statutory right to enter and do the work. And this was especially so, when it became the duty of the city officers to cause the work to be done. There is therefore nothing from which a license can be implied, because in the absence of a license the doing of the work which the public interests required, and which it was the duty of the city to have done, was no invasion. Besides, the authority to do the work under the circumstances, was already expressly granted and made lawful by the charter, without the necessity of having recourse to the presumption of a license.

But it may be insisted by the defendant in error that while Robbins had express authority to relay this sidewalk; and that while he relaid it according to the plan ordained by the Common Council, yet that no authority was conferred upon him to construct the area.

THE AREA, as already shown, *was but the space under the sidewalk*, and was the necessary consequence of relaying the sidewalk at a higher grade, in conformity with the ordinances.

The question is, therefore, whether the conversion of this space to area purposes put the public in greater jeopardy, by reason of fitting it for private use.

If what was done to turn the space into an area made it no more dangerous; if the covering of the sidewalk and its necessary supports, was proper and was in conformity with the ordinances, then the user of the space for area purposes was neither an encroachment nor an invasion. The space was not deepened or enlarged to make the area. As stated by the court below in presenting this branch of the case to the jury, "very little earth was removed to make the area; and what was removed was replaced by sand and other materials." There is no evidence in the case that the space was either narrower or wider than if no area had been planned or contemplated; and the covering contracted for by Robbins and laid was in conformity with that prescribed by the city for the sidewalk, and was every way safe when once put down for public use.

This appropriation of the space under the sidewalk was no invasion of, or interference with the public easement.

To make the appropriation, Robbins had but to enter into the hole already existing, and as dangerous to the public before the occupation as afterwards, and occupy it for his purposes as an appurtenance to his building—leaving the public to pass and repass on the sidewalk after it was relaid, precisely as if the hollow beneath had remained unoccupied or unused by him.

Thus it will be seen that the relaying of the sidewalk was the result of public necessity; and not the result of constructing the area: on the contrary, the area under the circumstances was but the harmless incident of a public improvement.

The city as a public municipal corporation, was in duty bound by its charter to keep and maintain its existing sidewalks which were in public use, in a safe and proper condition.

Sec. 4, par. 30 and 54, chap. 4, and
Sec. 1, par. 2, and sec. 2, chap. 7, City Charter.

The language of the charter is that of permission; but as to existing public improvements, it is held in legal effect, to be imperative. His Honor, Mr. Justice Nelson, so held in the case of *The Mayor, etc.*, v. *Furze*, 3 Hill, 612; since followed by *Hutson* v. *Mayor*, 5 Seld. 169. The same rule is announced in *Browning* v. *Springfield*, 17 Ill. 143; and the primary, or municipal duty thus created, is assumed to exist in this case as heretofore reported.

In the spring of 1856 there was, at the place of the accident, an old sidewalk in public use, which it was the duty of the city to maintain in a safe and passable condition. At this time the city, in the prosecution of a lawful work, to wit: raising to a higher grade and filling the carriage-way, commenced to create a public necessity for wholly rebuilding the old sidewalk upon the new grade; and *pari passu* its duty to the public to cause the sidewalk to be rebuilt arose.

It had no right to improve a part of the street by raising it in such a manner as not only to put the residue out of use, but leave it dangerous. As its duty with reference to the sidewalk thus arose, the *right to do the work* in the first instance, correspondingly accrued to Robbins by the express terms of the charter and existing ordinances.

The right thus given Robbins did not impose upon him the corporate duty resting upon the city towards the public in rela-

thorized by act of Parliament to construct a private drain, and to make an opening in the street for that purpose: he let the work to a contractor, the plaintiff, without fault, fell into the opening and was injured, and the contractor and not the employer was held liable. The court distinguish that, from the case of *Ellis* v. *Sheffield Gas Co.*, (cited in the opinion of this court in the case of *City* v. *Robbins*,) where the entry upon the street was unauthorized, and so unlawful; and it is equally distinguishable from that class of cases where the authority to enter upon the street is derived from an implied license, as in the case of the *City* v. *Robbins* before referred to, and the cases therein cited.

In *Blake* v. *Ferris* — a leading case on this subject — it appeared that the defendants applied to the city authorities for permission to construct a sewer at their own expense and for their sole benefit; express permission was granted to them to do the work, and they let out the execution of it to independent contractors; during the progress of the work and before its completion, injury was occasioned to the plaintiff by the negligent manner in which the unfinished sewer was left open and unguarded in the night; by reason of which the plaintiff without negligence or fault was driven into the opening in the street and injured: in that case the court held the defendants (the licensees) not liable. One of the questions was, whether the defendants, having the right to do the work, had also the right to let out the execution of it, so as to exempt them from liability for negligence of the contractor in the manner of doing it: and the court say (p. 52), "For the purpose of considering "the question before us the defendants may be regarded as the "persons at whose expense and for whose benefit the sewer in "question was to be constructed; having a lawful right to con- "struct it themselves or by their agents or servants, being respon- "sible to third persons for all injuries occasioned by the negligent "or improper manner in which they exercised that right; or, [as "having] the right to let by contract the execution of the work "to some other person, who, *as to the right to make the sewer*, might "be considered the representative of the defendants. This case "shows that the defendants adopted the latter course:" and they were accordingly held not liable.

Pack v. *Mayor* was the case of grading the Bloomingdale road,

in the city of New York. The municipal corporation having the authority to do the work, let the execution of it to an independent contractor. In the progress of this improvement it became necessary to remove rocks; and this was done by "blasting," which was negligently conducted, by means of which the plaintiff was injured, and the city was held not liable for the negligence of the contractor's servants. *Kelley* v. *Mayor* was also a case of grading the Bloomingdale road. The corporation let the work as in the preceding case; and while the plaintiff was driving along the road, a "blast" was let off without warning and the plaintiff's horse was thereby injured. The plaintiff was without fault; but it was held that the city was not liable for the negligence of the contractor's servants in that case. In both of the last mentioned cases the work was to be subject to directions from the proper city officer; but the court held that this control only extended to *results*, and not to the *manner* of doing the work. The case of *Painter* v. *Pittsburgh* was where the city, under its power to construct public sewers, let the work to independent contractors, through whose negligence in leaving the opening in the street uncovered over night, a person, without fault, fell in and was injured. In that case the city was held not to be liable for the negligence of the contractors.

The case now on hearing is not so strong against the employer as those where a municipal corporation was defendant; because, so far as Robbins was concerned, it could not be alleged that any public or municipal duty devolved on him.

But it is manifest that cases of negligence, arising out of constructing improvements which are in their nature of a public character, stand upon a different footing from those where work in a public street is of a private nature, and for the private benefit of an individual.

In the construction of a public improvement, pursuant to a statutory right, it is as much a part of the right to entrust the execution of the work to skillful and careful contractors, as it is a part of one's individual right, in making an improvement on his own land, to let the work in that manner. On this subject the language of the court in *Blake* v. *Ferris* is of singular force and aptness. The court say that "the impracticability "and injustice [of holding the express licensees who had let the

"work, to be liable for the contractor's negligence in leaving the "hole in the street uncovered over night] may be further illus- "trated by the common case of a man about to build a house "for himself. He may, if he please, manage the whole, give "directions, etc., etc., which his men would be bound to follow; "and thus make himself the master in fact of all the persons "employed; but, as Baron Parke said about the butcher driving "the ox, 'he is not bound to do so, and he may not know how "'to do it.' He may therefore let out by contract the building of "the house to some person who will undertake to do it. Would "he thereby become liable for all injuries to third persons for "negligence or misconduct in doing an act *tending to the construc- "tion of* the house? For instance, by the carpenter's men in "getting out timber in the forest; by the stone-cutter's servants "in blasting stone in the quarry; or by the teamsters in hand- "ling materials; such consequences would indeed shock the "common sense of all men."

There is more force in this position when the rule is applied to a public improvement of the character of that in this case. The right to do the work when necessary is given to every lot owner. But as in the case of building a house, it accords with the knowledge and experience of all, that but few persons possess the requisite skill to execute the work; and a particular class of persons must, to a greater or less degree, be entrusted with its execution.

And it is submitted that the more completely the execution of such a work, and the manner of doing it, are placed by the employer in the hands of skillful and independent contractors, the more fully has he performed his duty to the public. He has thereby substituted the skillful management and independent control of another, over the work, pending its execution, in the place of his own probable want of skill to direct.

Where a party unlawfully enters upon another, or upon the public; to do work for his exclusive benefit, it may be but just that he should be in duty bound absolutely to save the public from danger; and if charged absolutely with that duty he cannot shield himself from liability by directing another to commit the invasion, whether the person selected be servant or contractor.

So where a person enters under an implied license to do

work for his own exclusive benefit (as appeared in the case of the *City* v. *Robbins*). It is a condition of such license that nothing shall be done under it to the injury of the licensor; the entry of the licensee is an acceptance of its terms, and he becomes bound thereby in the same manner as if the same were reduced to writing and signed by him; his contract is that he will be responsible for whatever injury may be done to his licensor, whether by himself, his servants, or his contractors.

The obligation of the licensee is not one imposed on him by law independent of contract, but one assumed by the very terms of the contract as implied from the circumstances.

Nelson v. *Godfrey*, 12 Ill. 20.

And herein consists the difference between an implied and an express license containing no such contract.

When, however, the right to do an act springs from an express grant or permission; or from statutory authority, while everything is granted along with the right necessary to the exercise and enjoyment thereof, no conditions are attached but those expressed.

And when a right to do an act is conferred or granted in this manner, if the thing authorized to be done requires skill and care in the execution, the person in whom the right exists not only may but it is his duty to procure the requisite skill and employ it in the execution of what he is authorized to do.

To entrust the execution to the exclusive control of a skillful contractor is a complete discharge of all the duty which the law imposes on the employer in such a case, provided the *result* — when the work is finished — conforms to what was authorized.

In this case no duty devolved on Robbins by reason of the plan, or character of the work; the latter was required by the public interests; the former was ordained by the Common Council.

The entry to rebuild the walk was neither an invasion, nor unlawful, nor was it under a license, but was a matter of express right under the circumstances: — therefore the entry to do the work did not create an *absolute* duty on Robbins, towards the public, as it would have done had he entered under an implied license or caused an unlawful entry. The only duty in this case arises out of the manner of executing the work; and the

further obligation on Robbins' part to see that when finished it conformed to what he had the right to do. The manner of doing it was confided to contractors, and placed under their exclusive control and direction; and the duty of careful and skillful performance remained with, and devolved on them, until its completion. When finished, the result was in strict conformity with what was authorized, and discharged Robbins' undertaking to do the work.

But pending its execution, and while in the exclusive control of the contractors and their servants; and while Robbins had no power or authority to remove the contractors' servants from the work, the accident to Woodbury occurred.

The injury resulted immediately from the negligence of the contractors' servants in leaving *uncovered* or improperly covered over Sunday, the hole which Robbins had *by contract directed them to cover.*

Aside from the character and plan of the work, for which, from its origin and nature, Robbins could not be held responsible, the omission to put on the covering was the direct and only cause of the injury. That omission was never directed by Robbins, but was the wrongful act of the contractors' servants.

The court is bound to presume that this plan, anthorized by the Common Council, could be carefully executed, without the necessity of such a negligent omission; and Robbins had the right — as against the city, which had forced the plan upon him — to suppose the same thing.

Under these circumstances if the contractor, *while invested with the control of the work*, unnecessarily committed a nuisance, Robbins is not liable therefor, or for the consequences.

Peachey v. *Rowland*, 76 E. C. L. 181.
Overton v. *Freeman*, 73 E. C. L. 867.
Allen v. *Hayward*, 53 E. C. L. 960.
Reedie v. *Railway Co.* and *Hobbit* v. *Railway Co.*, 4 Exch. 255.
Saltonstall v. *Banker*, 8 Gray, 195.

But if the plan, thus authorized, could not be executed without the commission of a nuisance, then as it was authorized by law the injury would be *damnum absque injuria.*

First Baptist Ch. v. *Utica and Sch. R. R. Co.*, 6 Barb. 318.
Call v. *Allen*, 1 Allen.
Wilson v. *Mayor*, 1 Denio, 595.

It has been claimed in this case, that Robbins committed a breach of duty in not guarding the work with lights; but by the Charter (Chap. 4, Sec. 4, Par. 47, Mun. Laws, p. 24,) the right to erect lamps and regulate the lighting thereof, was vested in the city:—and, had he attempted this, he would have been guilty of a public nuisance.

City of Buffalo v. *Holloway*, 3 Seld. 493.

The only guard practicable, was the one directed by the City Superintendent; temporary in its character; and to be removed from time to time as the work progressed. This and all other necessary guards were incident to the careful performance of the work, and required of the contractors.

The necessity of removing or disturbing the temporary covering from day to day as the work progressed, imposed the duty of its removal and replacement on the contractors, and was a part of their agreement with Robbins.

It has also been claimed that Robbins, as the owner of a lot, is responsible for the negligence of his contractors in constructing the sidewalk in front of his premises. But the cases of *Reedie* v. *Railway*, 4 Exch. 244, and *Peachey* v. *Rowland*, 76 E. C. L. 182, and *Boswell* v. *Laird*, 8 Cal. 469, are in point the other way. The case of *Bush* v. *Steinman* never went that far, even before it was qualified and finally overruled. *Hilliard* v. *Richardson*, 3 Gray, 349. A work of this character, done by and in conformity with legal authority, cannot of itself, nor in its essential parts, be deemed a nuisance, although in the absence of the legal authority it might be such.

Treating the sidewalk as a public improvement expressly authorized, and regarding the space beneath the surface as equally dangerous, whether converted into an *area* or not, this case, as to the liability for the negligence of the contractor and his servants is distinguishable from that class which charges the contractor with liability, on account of the character of the work directed to be done.

Boswell v. *Laird*, 8 Cal. 493.
City v. *Robbins*, 2 Black, 418.

It is also distinguishable from the class of cases where the employer is held liable because the result accomplished was not what the employer was authorized to do.

Hole v. *Railway Co.*, 6 Hurls. & Norm., 488; where the defendants were to construct a bridge so as not to obstruct navigation, and when completed it did obstruct it.

It is also distinguishable from cases where the employer is held liable for suffering a work finished and returned to his control to afterwards get out of repair or become a nuisance so as to cause an injury.

It is also distinguishable from those cases where the employer is liable during the progress of the work, by reason of reserving control over the manner of its execution.

Cincinnati v. *Stone*, 5 Ohio N. S. 38.

And see *Reedie* v. *Railway*, 4 Exch. 244, as to the nature of control to be reserved in order to render the employer liable.

It is also distinguishable from those cases where a particular duty was enjoyed by the law conferring the right, and on account of a breach of which, injury has been occasioned.

Hole v. *Railway Co.*, *supra.*

It is also distinguishable from those cases where a party without lawful authority has directed an act to be done which has caused an injury to others.

Ellis v. *Sheffield Gas Co.*, 75 E. C. L. 767.
Congreve v. *Morgan*, 18 N. Y. 84.
Creed v. *Hartman*, 29 N. Y. 591. Opinion of Selden.

It is also distinguishable from those cases where the employer was only invested with the authority of an implied license to do work for his own benefit.

Nelson v. *Godfrey*, 12 Ill. 20.
Chicago v. *Robbins*, *supra.*

In the case of *Scammon* v. *Chicago*, 25 Ill., the area was made as in this case, without the necessity of entering upon the street for that purpose; but rather in connection with the relaying of the old sidewalk, for the relaying of which there was the same right, and the same public necessity, occasioned by the

raising of the carriage-way as in this case. The hole existed and was caused in that case by adhering to and executing the same authorized plan as in this case; and the area in that case, as in this, was formed out of the space, without in any way enhancing the public danger, or liability to injury. The mere act of converting the hole into an area, was not expressly authorized by law. But as this could be done without disturbing the public easement, which was already temporarily suspended to relay the walk, the court did not consider the work of converting the hole into an area, an encroachment upon or invasion of the rights of the public; and so charged no duty on Scammon on account of the appropriation of the hole under such circumstances. The right in Scammon to relay the sidewalk was unquestioned: and to the execution of that public improvement the court properly referred *the work of covering;* the omission of which, and of guards during the progress of the work, caused the injury. From this point of view it will be seen that the language of that court was not altogether without force or reason when it was said that "the omission to cover the opening in the "area did not necessarily occur as an incident to the prosecu- "tion of that work." The court did not forget, although it failed to give expression to the fact that the *work of covering* was fairly referable to the sidewalk improvement, for the making of which there was lawful authority.

The decision of this court in the case of *City* v. *Robbins* did not necessarily conflict with the settled law of the State of Illinois, as laid down in the *Scammon case:* but was in accordance with the law of that State as declared in *Nelson* v. *Godfrey.* But the decision in the *Scammon case* ought to govern the case now on hearing; as otherwise citizens of other States would be subject to liability where the citizens of Illinois are exempt.

The presentation of this case thus far, has proceeded upon the theory of an express authority in Robbins to enter and do the work. But, bearing in mind that the public interests required the work to be done; that, therefore, it was primarily for the public benefit, and so appears from the character of the work; that it was directed to be, and was in fact done in the usual and ordinary way, suppose Robbins as a lot-owner had entered as a volunteer (with the knowledge and consent of the

city) to rebuild the sidewalk; would an entry for that purpose amount to such an invasion of, or encroachment upon, the rights of the public as to require a license to render the rebuilding of the sidewalk lawful?

Would not the entry be lawful under such circumstances, without regard to the existence of a license, express or implied? And, therefore, would any duty devolve on him beyond employing the requisite skill to do the work in the usual and ordinary mode? And would not the entrusting of its execution, with the knowledge and consent of the city, to skillful and competent men, discharge all the duty which the law would imply, although the work might incidentally benefit him?

This view is respectfully addressed to the consideration of the court, as distinguishing the case from an entry upon a public street, and temporarily disturbing the public enjoyment of it, to enable a party to gain an exclusive benefit for himself.

The remaining question in the case relates to the alleged notice to Robbins of the pendency of the Woodbury suit.

The evidence tended to show that Robbins knew little or nothing of the facts at the time that suit was pending; that before the accident, and for some time after the suit was brought, he was sick at the Tremont House; that he conversed with a man by the name of Livingston about it on one occasion. The conversation arose from the fact that Woodbury was an acquaintance of both Robbins and Livingston, and the latter then said that Woodbury was not hurt much. At another time, Marsh, the City Attorney, casually met Robbins at the Tremont House, and chanced to mention the Woodbury suit, whereupon Robbins stated to him what Livingston had said. Marsh testified that in what he said he had no purpose of notifying Robbins of the suit; and it does not appear that either he or Robbins were then possessed of sufficient information to lead either of them to think that the matter in any way concerned Robbins; or that anything was or would be required of him; the only thing he knew with certainty was that his acquaintance, Woodbury, had sued the city for an alleged injury, and that Livingston had said that Woodbury was not hurt much, but was *shamming*.

It does not appear that Robbins was positively informed

where the accident was alleged to have occurred. But the evidence tended to show that he did not know, and was not informed in what court that case was pending. And it is for these reasons submitted, as this was the character of the notice, that it was insufficient to make the judgment in the Woodbury case, conclusive on him in this suit.

As the city did not request Robbins to defend the suit brought by Woodbury, nor communicate to him all the facts in relation thereto, it should have been submitted to the jury, whether the facts communicated—considering the circumstances under which the communication was made—were such as would have caused a prudent man to act.

1. Where the facts are all communicated, the law raises the duty of attending to the defense; and charges it upon the party to whom the communication is made.

2. Where the facts are partially communicated, and a request is made, the law charges the party with the duty of ascertaining the other facts, and of defending.

3. Where there is no request, and where the facts are only partially communicated, it depends upon the circumstances under which the communication is made, as to whether the party is charged with any duty resulting therefrom. If the circumstances were such that a prudent man might be reasonably expected to act upon them, then the partial commuuication may be considered as notice. But if from the facts communicated, and from the circumstances under which they were communicated, a prudent man would not be expected to act upon them, then the communication ought not to be deemed notice; and this is more especially true when neither the party making the communication, nor the party receiving it, had any idea that the latter was in any manner to act by reason of what was said.

F. H. KALES,

Of Counsel for Plaintiff in Error.

SUPREME COURT OF THE UNITED STATES,

DECEMBER TERM, 1866,—Case No. 132.

GEORGE A. ROBBINS, Ex'r, Plaintiff in Error,

v.

CITY OF CHICAGO, Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR.

C. BECKWITH, OF COUNSEL.

SUPREME COURT OF THE UNITED STATES.

GEORGE A. ROBBINS, Ex'r,
vs.
CITY OF CHICAGO.

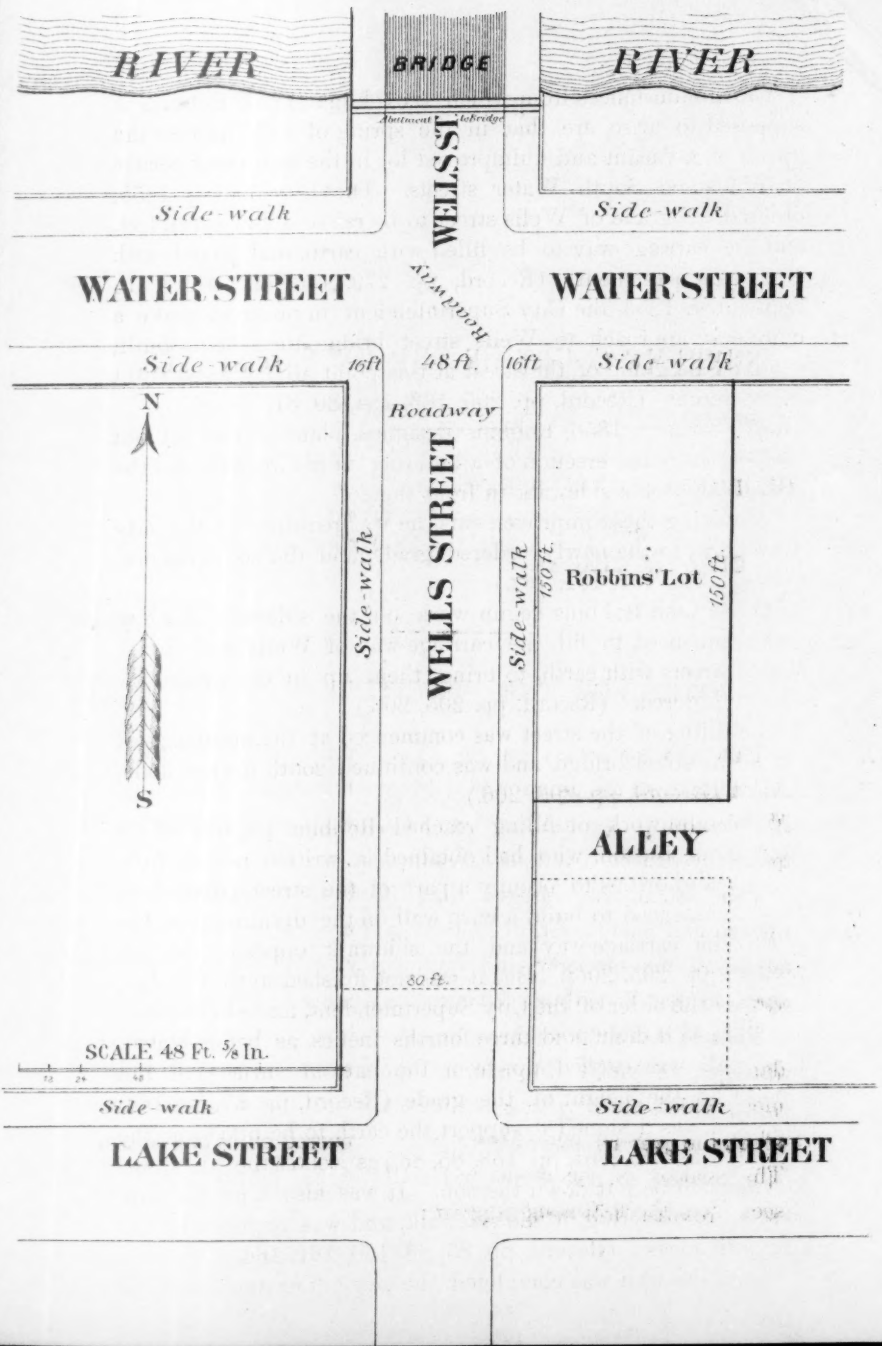
Error to the Circuit Court for the Northern District of Illinois.

BRIEF FOR THE PLAINTIFF IN ERROR.

This was an action on the case, brought to recover from Allen Robbins the amount of a judgment obtained by William H. Woodbury against the City of Chicago, for injuries sustained by reason of a defective sidewalk.

The declaration alleges, that Robbins wrongfully dug, opened and made a pit, or hole, in a public street next to and adjoining his property, and improperly suffered it to remain open, so that Woodbury fell into the same and was injured.

That Woodbury commenced suit against the City to recover damages, of which Robbins had notice, and recovered judgment, which the City was obliged to pay. The accident from which the present controversy arises, occurred on Wells street. The location of the street and of Robbins' property, will be seen from the following diagram:


RIVER
BRIDGE
RIVER
Abutment
Tollbridge
Side-walk
WELLS ST
Side-walk
WATER STREET
Roadway
WATER STREET
Side-walk
16ft
48ft.
16ft
Side-walk
N
Roadway
WELLS STREET
Side-walk
Side-walk
150ft.
Robbins' Lot
150ft.
ALLEY
80 ft.
SCALE 48 Ft. 5/8 In.
Side-walk
Side-walk
LAKE STREET
LAKE STREET

The circumstances from which the obligation of Robbins is supposed to arise, are, that in the spring of 1856 he was the owner of a vacant and unimproved lot in the south-east corner of Wells and South Water streets. The City had, in 1855, ordered the grade of Wells street to be raised about seven feet, and the carriage-way to be filled with earth, and paved with Nicholson pavement. (Record, pp. 279, 140, 141, 169.) In September, 1856, the City Superintendent, in order to make a more easy approach to Wells street bridge, then being built, directed the grade of the street at this point to be raised eight inches more. (Record, pp. 205, 183, 184, 80, 81, 89, 90.)

In February, 1856, Robbins designed, planned, and let out to contractors the erection of a building on his lot, and also the construction of a sidewalk in front thereof.

In making these improvements, he was required by the city to conform to the newly ordered grade, and did so. (Record, pp. 183, 184, 167, 161, 162.)

At the time Robbins begun work on the sidewalk, the city had commenced to fill the carriage-way of Wells and South Water streets with earth, to bring them up to the grade previously ordered. (Record, pp. 205, 206.)

The filling of the street was commenced at the abutment of the Wells street bridge, and was continued south toward Lake street. (Record, pp. 205, 206.)

Before the work of filling reached Robbins' lot, one of his contractors, Button, who had obtained a written permit from the city authorities to occupy a part of the street, (Record, p. 201,) commenced to build a curb-wall on the dividing line, between the carriage-way and the sidewalk opposite the lot. (Record, pp. 205, 206.) But it was not finished until October, owing to the order of the City Superintendent, made in September, to raise it eight and three-fourths inches, as before stated. This wall was carried up from the natural surface of the ground to the height of the grade, (Record, pp. 87, 88, 161, 162,) and was designed to support the earth to be filled into the carriage-way, (Record, pp. 158, 85, 86,) as well as the Nicholson pavement to be put down thereon. It was also a proper support for the covering of the sidewalk, and was required by the city ordinances. (Record, pp. 85, 86, 160, 161, 166.)

When the wall was completed, the city authorities made use

of it to hold the filling of the carriage-way in its place, and to support the pavement. (Record, pp. 206, 90, 91.)

Before Wells street was paved, the city caused the proper sewers to be constructed. These were not completed until December, 1856, (Record, p. 279,) after which the pavement was laid. Up to that time the carriage-way of the street was not in a passable condition, and was not used.

The portions of the street between the carriage-way and the adjacent property, were unfilled. These constituted the sidewalk portions of the street, and were not required to be filled, but only to be covered over at grade. (Record, pp. 166, 167, 169, 84, 102, 103.)

A little earth was taken from the surface of the ground where the old sidewalk had been, but this was replaced by sand and other materials before the injury to Woodbury. (Record, pp. 289, 202, 203, 204, 207.)

The removal of the surface of the ground, and replacing it with sand and other materials, did not in any manner contribute to the injury complained of.

Robbins, in the erection of his building, was required by the city authorities to conform to the new grade, although the street had not then been filled; and he must have known of the proposed raising and paving of the carriage-way at the time he contracted for the erection of his building. He also must have known that the filling of the carriage-way would leave the old sidewalk about seven feet below the surface of the improved street; that a hole at this place of that depth would be thus produced; and that a covering at grade would be necessary to make a sidewalk. He also knew that the city was bound to require him to build a sidewalk at grade for the public use contemporaneously with the improvement of the street. He accordingly contracted to have the anticipated hole covered over for public use as a sidewalk, in the usual mode, and in conformity with the city ordinances, (Record, pp. 160, 161, 280,) and to have the hollow space which would remain thereunder — like that under all sidewalks — (Record, p. 161,) finished for coal vaults and area purposes. To this extent, and to this extent only, did Robbins contract for the construction of an area.

The finishing of the vacant space beneath the covering of

the walk, did not render it any more dangerous to the public. The accident to Woodbury occurred on Sunday evening, December 28th, 1856. On the night previous the servants of Letz & Co., (contractors of Robbins') not having wholly laid their prismatic iron grating to complete the permanent covering of the new sidewalk, left the unfinished portion with a temporary covering over it of boards and joists, (Record, pp. 214, 216,) which proved insufficient to prevent Woodbury from falling into the hollow space beneath. This temporary covering, to be replaced by the grating, had been previously ordered by Granger, the City Superintendent of Public Works. (Record, p. 74.) The place was kept covered by the temporary covering after the order requiring it was made. (Record, pp. 95, 94, 74, 279.) The City Superintendent was about the work every day, and had no recollection that the place was in a dangerous condition, after the order requiring a temporary covering. (Record, p. 96.)

The power to erect lamps and regulate the lighting thereof, was exclusively vested in the Common Council of the city; (City Charter, chap. 4, sec. 4, par. 47;) but no lamps were erected, and there were no lights at the corner of Wells and South Water streets, when the accident to Woodbury occurred.

It appears from the evidence that Robbins was sick at the Tremont House, from November, 1856, to February, 1857, (Record, pp. 177, 178,) and the accident occurred, and suit was brought by Woodbury therefor, in the meantime.

Woodbury had been accustomed to go to the Tremont House; and one Livingston was also a frequent visitor there. On one occasion Livingston told Robbins that the young man who lodged in the same house with him, and who frequently came to the hotel to play billiards, (alluding to Woodbury,) had fallen into an area, but that he was not hurt at all. (Record, p. 190.) Livingston was not certain that the accident occurred in front of Robbins' building. (Record, pp. 196, 197.)

Afterward, and before the Woodbury suit was tried, Marsh, the City Attorney, casually met Robbins at the Tremont House, but with no intention or design of notifying him of the suit, (Record, pp. 108, 110, 111, 112,) and casually informed Robbins that Woodbury had sued the City. Thereupon Robbins repeated to Marsh what he had heard from Livingston,

(Record, pp. 107, 109, 190,) and said that Livingston was in town very often, and he would ascertain what he knew about the matter. (Record, p. 191.) Afterwards Marsh, (whose term of office had expired,) in coming down stairs at the Court House, accidentally met Robbins, and told him that the case was coming on for trial, to which Robbins made no reply. (Record, p. 108.) At this time J. C. Miller was City Attorney. (Record, p. 281.) Robbins was not at any time informed by Marsh where the accident occurred, nor that he was in any way concerned in relation to it, nor in what court the case was pending. (Record, p. 110.)

In the spring of 1856, before the City actually entered upon the improvement of Wells and South Water streets, these streets, including the sidewalks, were in public use. By the City Charter, (chap 4, sec. 4, paragraphs 30 and 54, Municipal Laws, Chicago, ed. 1856, pp. 23 and 26,) the corporation had exclusive power to control, regulate, repair and amend all streets and sidewalks; and the further power (chap. 7, sec. 1, Municipal Laws, Chicago, p. 38,) to cause the streets and highways to be graded, leveled and paved; and also the power (Charter, chap. 7, sec. 1, paragraph 2, ibid,) to cause sidewalks to be constructed, relaid and repaired. These were classed by the Charter (chap. 7, *supra*,) as public improvements, and all of them, *except sidewalks*, were to be made at the expense of the property deemed benefited, in any natural division of the city. (Chap. 7, sec. 2, *supra*.)

In relation to sidewalks it was provided in the Charter (chap. 7, sec. 10, Municipal Laws, p. 40, and Record, pp. 169, 170,) that "all owners, etc., in front of or upon whose premises the Common Council should order and direct sidewalks and private drains to be constructed, repaired or relaid, should make, repair or relay such sidewalks at their own cost and charge, in manner and within the time prescribed by ordinance *or otherwise;* and if not done in the manner and within the time prescribed, the Council might cause the same to be constructed, etc., and assess the expenses on the owners' lots." The City afterwards passed an ordinance specifying the manner in which sidewalks to be ordered by the Council should be built; fixing the height from the surface of the ground and the width, providing for proper supports and for a curb wall, and also for a *covering* at grade.

The city also passed an ordinance directing the repair and *relaying* of all old sidewalks, whenever their condition was such as to require it; and giving authority to the street commissioner to require of the adjoining lot owner to do the work; and in default thereof that the city should do it, and charge the expense on the owner's lot.

Sec. 14, ch. 53, Ord. Mun. L. 1856, p. 399.

(Ordinances set forth in Record, pp. 84, 103, 166, 167, 168, 169, 170; and see Municipal Laws, ed. 1856, pp. 393 to 400.)

The primary duty of keeping the streets and sidewalks in a safe and passable condition was imposed upon the City; the power to order them built and to direct in what manner they should be built, was also conferred upon the City; and it was bound to exercise this power whenever its duty to the public to keep the sidewalks in a safe condition should arise. But the privilege of building and rebuilding sidewalks, when necessary, was by the Charter expressly allowed to the owners of the adjacent lots.

The City had the right to order a new sidewalk, or the repair of an old one, at any time in its discretion, whether necessary or not, and the owner was required to do the work or pay the expense of it as well in the one case as in the other.

Where there were no circumstances existing which, as to the public, imposed a duty on the City to order a sidewalk built or relaid, and when it or its officers had made no order for one, if the owner built or relaid the sidewalk in front of his property he might reasonably be deemed to undertake the work primarily for his own benefit, and only incidentally for the benefit of the public.

The undertaking, under such circumstances, would only be lawful by reason of an implied license to do the work; and then on condition that he should save the public from harm until the street or sidewalk thereby disturbed should be restored to the public in its former safe condition and usefulness. Such, in principle, were the cases of *City of Chicago* v. *Robbins*, 2 Black, 418, and the cases of *Nelson* v. *Godfrey*, 12 Ill. 20; *Clark* v. *Fry*, 8 Ohio, 359; *Ellis* v. *Sheffield Gas Con. Co.*, 75 E. C. L. 767; *Newton* v. *Ellis*, 85 E. C. L. 123; *Congreve* v. *Morgan*, 18

N. Y. Rep. 84; *Storrs* v. *City of Utica*, 17 N. Y. Rep. 108; *Coupland* v. *Hardingham*, 3 Camp. 398, therein cited.

But the case now presented for the consideration of the court is essentially different in character from the foregoing cases. The City itself created a public necessity for rebuilding the sidewalk at this point prior to the entry of Robbins to build it; therefore it was the duty of the city officers, under the Charter, to have made an order requiring him to rebuild it at the new grade. To restate the facts bearing upon this point, it appears that the City had previously ordered the carriage-ways of Wells and South Water streets to be raised and filled to the new grade and paved; the corporate authorities had required Robbins to put up his building with reference to the new grade; at the time his contractors commenced their work on the building, the City had commenced its work of filling to grade the portion of both streets lying between the sidewalks on either side; this improvement, as it progressed to completion, would leave the surface of the old sidewalks at this point far below the rest of the street, thus causing a vacant space or pit sixteen feet wide and about seven feet deep around Robbins' building on both streets, and putting the old sidewalks out of use by obstructing their passage ways at the street crossings, where the raised carriage-ways of Wells and South Water streets intersected, near the corner of Robbins' building.

As this improvement (lawfully undertaken by the City) would —if nothing else were done—render the rest of the street occupied by the sidewalks impassable, it became the duty of the City, by reason of its primary obligation to the public, to cause the sidewalks to be rebuilt.

To perform this duty it was necessary for the city officers, in the first instance, to order Robbins to build them, and in case he omitted to do so, then to build them themselves, and charge him or his lot with the expense. The City commenced a few rods north of Robbins' lot, at the abutments of the Wells street bridge, to fill the carriage-ways with earth, working south towards the lot. The erection of the curb wall, required by the ordinances, must necessarily precede the filling and paving of the carriage-ways; and Robbins, in planning the improvement of his lot, knew this, and contracted for the erection of a curb wall and sidewalk in connection with the erection of

his building, and had the right to expect the city officers would order him to construct them as soon as the City's duty to the public required the order to be made. The erection of the curb wall was required by ordinance as part of the sidewalk, and it will be presumed that the city officers gave the proper order to Robbins to proceed with the work. The duty of the City to cause the sidewalk to be built was absolute. The obligation of building it rested upon Robbins. And although the time for the performance of his obligation had not been fixed by an order of the Common Council, or of the officers of the City, the obligation itself had been imposed by the action of the city; and it only remained for the city officers to fix the time in which it should be discharged in case he neglected to discharge it within a reasonable time. Under these circumstances, Button, the contractor of Robbins, built the curb wall provided by the ordinances.

As soon as this wall was sufficiently completed, the City made use of it by causing the carriage-way to be filled and paved. Thus the improvement of the street, both by the City and by Robbins, in front of his lot, commenced.

The obligation of Robbins to relay the sidewalk at the new grade arose from the act of the City in improving the residue of the street; but the time of his performance of it was not fixed. Robbins performed the obligation by requiring his contractors to do the work without requiring the city officers to fix a time within which the work should be done.

Under these circumstances the work was primarily for the public benefit, because the public had a right to require the City to cause it to be done at the time it was performed.

The sidewalk consisted of a curb wall, an inner wall to support the covering, and the covering at grade. The curb wall and a covering at grade were expressly authorized by the ordinances; and both walls were usual and necessary supports for the covering.

No breach of duty is alleged as to the kind of materials used. They were, in fact, more substantial than the ordinances required.

The work was contracted to be done substantially in conformity with the ordinances, and its performance, under the

circumstances, discharged the obligation of Robbins to build the sidewalk.

I. The City was bound by its obligation to the public to have ordered the sidewalk relaid at grade, at the time the work was done; the obligation resting on the City created a corresponding obligation on Robbins to do the work or pay the expense. The obligation of the City was absolute; that of Robbins was imperfect only as to the time of its performance; but the city officers could at any time, by order, compel him to perform it. Robbins by his contractors entered upon the discharge of his obligation, and it will be presumed that he did so in pursuance of a proper order.

1. Where a public body is clothed by statute with power to do an act which the public interests require to be done, and the means of doing it are under the control of the corporation and at its disposal, it is in duty bound to exercise the power and cause the act to be done.

People v. *Corp. of Albany*, 11 Wend. 540, 543.
Mayor, etc., v. *Furze*, 3 Hill, 612.
Wilson v. *Mayor, etc.*, 1 Denio, 601.
Hutson v. *Mayor, etc.*, 5 Seld. 163.
Browning v. *City of Springfield*, 17 Ill. 143.

Especially is this the rule where a public necessity for the performance of the act is created by some other act done by the corporation itself.

Barton v. *City of Syracuse*, 37 Barb. 292.
Mills v. *City of Brooklyn*, 32 N. Y. 489.
Rochester White Lead Co. v. *City of Rochester*, 3 Com. 463.
Goodrich v. *City of Chicago*, 20 Ill. 445.

Where there is a neglect to perform a duty to the public, and injury is thereby occasioned to the property of an individual whereby he sustains damage over and above that done to him as one of the public, he is entitled to recover therefor in a private action. (*Cases before cited*)

The City was under no obligation to the public to grade and pave Wells and South Water streets, then in public use; but having undertaken the work, the doing of which created a public necessity for new sidewalks, it was bound to have ordered them. Robbins in making them was not only discharging the

imperfect obligation resting on him, but he was also relieving the City of its obligation to the public, as well as from any private damage to his property which might have ensued had he waited for a compulsory order to finish the work within a given time. (Record, pp. 183, 184.)

2. Robbins having entered upon the street in discharge of his obligation to the City, was in as of right, and not by virtue of a license, express or implied.

A license, express or implied, is a permission to do something which, without it, would be unlawful.

Thomas v. *Sorrell*, Vaugh. 330, 351.
Wood v. *Leadbitter*, 13 M. & W. 845.
Cook v. *Stearns*, 11 Mass. 533.
Woodward v. *Seely*, 11 Ill. 157.

It is essential to a license that the thing which it permits would, without the permission, be unlawful. If the act done is in itself lawful, a license cannot be implied for its commission.

In order to constitute a valid license, the licensor must have it in his power to authorize the doing of that which would otherwise be unlawful. In short, there must be a grantor, a grantee, and a thing to be granted.

If therefore, the act is—in itself—lawful, there is nothing to be granted; and, where there is nothing to be granted, there is nothing from which a grant can be implied.

In this case Robbins had an absolute right to enter upon the street and construct the sidewalk portion of the improvement. A formal grant to him of the right to enter upon the street and do the work, would not have conferred any authority so to do, for the reason that the authority assumed to be granted was already vested in the grantee, and a grant cannot be implied where nothing would pass by an express grant.

II. If Robbins entered upon the street under his right so to do, and let the work of constructing the sidewalk to skillful contractors, he is not responsible for their negligence.

Reedie v. *Railway Co.*, 4 Exch. 244.
Peachey v. *Rowland*, 76 E. C. L. 182.
Gray v. *Hubble*, Q. B. Ap. 1863,
(reported in Law Jour. Rep., vol. 32, pt. 8 N. S.)
Blake v. *Ferris*, 1 Seld. 48.
Pack v. *Mayor*, 4 Seld. 222.
Scammon v. *City of Chicago*, 25 Ill. 425.

III. Although Robbins was the owner of a lot, he is not on that account responsible for the negligence of his contractors in constructing the sidewalk required in front of his premises.

Reedie v. *Railway Co.*, 4 Exch. 244.
Peachey v. *Rowland*, 76 E. C. L. 182.

IV. Robbins was under no obligation to guard the work by lights; he would have been guilty of a public nuisance had he undertaken to do so.

City Charter, chap. 4, sec. 4, par. 47, Mun. Laws of Chicago, p. 24.
City of Buffalo v. *Holloway*, 3 Seld. 493.

The only guard practicable was the one directed by the City Superintendent; temporary in its character; and to be removed frrom time to time as the work progressed. This and all other necessary guards were incident to the careful performance of the work, and required of the contractor.

From the fact that the temporary covering was to be removed from day to day, as the work progressed, it is evident that it was the duty of the contractor to attend to its removal and replacement.

V. As the City did not request Robbins to defend the suit brought by Woodbury, nor communicate to him all the facts in relation thereto, it should have been submitted to the jury, whether the facts communicated—considering the circumstances under which the communication was made—were such as would have caused a prudent man to act.

1. Where the facts are all communicated, the law raises the duty of attending to the defense; and charges it upon the party to whom the communication is made.

2. Where the facts are partially communicated, and a request is made, the law charges the party with the duty of ascertaining the other facts, and of defending.

3. Where there is no request, and where the facts are only partially communicated, it depends upon the circumstances under which the communication is made, as to whether the party is charged with any duty resulting therefrom. If the circumstances were such that a prudent man might be reasona-

bly expected to act upon them, then the partial communication may be considered as notice. But if from the facts communicated, and from the circumstances under which they were communicated, a prudent man would not be expected to act upon them, then the communication ought not to be deemed notice: and this is more especially true when neither the party making the communication, nor the party receiving it, had any idea that the latter was in any manner to act by reason of what was said.

C. BECKWITH,
Of Counsel for Plaintiff in Error.

Supreme Court of the United States.

No. 132.

GEORGE A. ROBBINS, Executor of Estate of Allen Robbins, Plaintiff in Error,

vs.

CITY OF CHICAGO, Defendant in Error.

REPLY OF COUNSEL FOR DEFENDANT IN ERROR TO THE PRINTED ARGUMENTS OF COUNSEL FOR PLAINTIFF IN ERROR.

The counsel for the defendant in error, not having been furnished with the briefs of the counsel for plaintiff in error until a fewhours before this case was called on for hearing, begsrespectfully to submit to this Court the following observations:

I.

This case did *not* have its origin in any relaying of an old sidewalk—as is stated and set forth in plaintiff's brief—but arose from the carelessness and negligence of the plaintiff "in leaving open, unguarded, and unprotected an area" which the plaintiff was fitting up *for coal vaults* in and under a sidewalk next to a large iron-front building which the plaintiff in error (Robbins) was at that time *erecting* in the city of Chicago, at the corner of Wells and South Water streets.

II.

The area was no "harmless incident of a *public* improvement," (see Mr. Kale's Brief, p. 11,) which Robbins had been

compelled to make, either by the city of Chicago or anybody else whatever, but was part and parcel of "a plan," which *Robbins* had deliberately formed and adopted. It was attached to his building, was made by him for *his own use and purposes*, was under his management and control, and *he left* it open, unguarded, and unprotected, and it was into *this* area, *thus* left, that Woodbury fell and was injured.

See testimony of Van Osdell, Robbins' architect, found in the Record, p. 50 to 56, where the Court will find a full explanation of Mr. Robbins' plan; and on a sketch of the ground plan of the premises being shown Mr. Van Osdell, he was asked the following questions, and made the following answers:

Q. Will you look at that rough sketch, and say whether it gives the idea?

A. This represents an area around the corner of the building, which was similar to the way that thing was constructed.

Q. Are the dimensions similar? It is not made on any particular scale, but it is intended to show the dimensions.

A. That is right, the *area* four feet ten inches.

Q. That conveys an idea of the opening that has been spoken of?

A. Yes.

Q. Intended to be covered by this grating, as it is called?

A. The opening that is spoken of was not intended to be covered, but to have a rail round it. The *grating had been finished*, but *the part* that was to have the rail was unfinished for want of the rail. *It was put round afterwards*—a vertical rail round the area.

Q. The excavation under the sidewalk was used in what way—for *what purpose* was it made?

A. They *were designed for vaults for coal.*

Q. Were those vaults *appurtenant* to the building *to be* used by the tenants for storing coal and other matter?

A. *Yes;* by the tenants for storing coal and other matter.

Q. Was that excavation under all the sidewalk?

A. Yes; under both streets.

Q. Was that part of your plan?

A. *Yes*, sir.

In speaking of the excavation, his evidence was as follows, (see Record, p. 51:)

Q. Who excavated the earth that was taken out from under the sidewalk?

A. The mason contractor, Peter Button.

Q. Was that a part of his duty to prepare that excavation?

A. It was.

Q. Was Mr. Robbins about the building at the time that this work was going on?

A. *He was.*

Q. And saw it going on?

A. *He did.*

Q. Was *that* excavation and that work upon *the area* or the curb walls? Was that a portion of *the* work being done for Mr. Robbins?

A. It was.

Q. Did you certify to Mr. Robbins, upon which *he* made payments for *that* work as well as the rest?

A. *I did*, sir.

Q. You say, then, Mr. Van Osdell, that *that* was a portion of the design; I mean, to make the excavation under the sidewalk?

A. *It was part of the design.*

Q. Mr. Robbins was aware of it, and saw it being done?

A. *Yes.*

Q. Was the building erected and all the appurtenances to it in conformity with the plan made by you?

A. It *was;* with some slight changes. I don't remember what.

Q. Substantially?

A. Yes.

Q. And *superintendent* by you *as architect* for Mr. Robbins?

A. Yes, sir.

Now turn to the testimony of Mr. Robbins himself, (the

plaintiff in error in this case,) found on page 65 of Record, and see what he says.

Q. Mr. Robbins, was the *area* under the sidewalk a part of the plan of the building?

Witness. The vaults, do you mean?

Counsel. Yes.

A. The vaults *were part of the original plan* represented on the plan, and on the working plan.

Q. The excavation under the sidewalk was make for your convenience as the owner of the building?

A. Yes; what excavation was made.

Q. And was part of the plan of the building?

A. Part of the plan of the building.

Q. You knew of the excavation under the sidewalk *up to the building* having been made?

A. Yes, sir.

Q. It was made while you were about the building?

A. Oh, certainly; that is, a portion of it. A portion was made while I was absent in New York.

Q. After you returned you saw that it had been done?

A. Yes, sir.

By examining the testimony of Peter Button, the witness above referred to by Mr. Van Ordell, who made the excavation, (see Record, p. 69,) the court will find that he was the first man employed about the building, in order to prepare the ground for laying the foundation, and that he *completed all of this* work *early in the spring;* and that the curb wall and area wall were ready for the flag-stones as early as the middle of May. (See Record, p. 69.)

Now it is asserted over and over again by the counsel for the plaintiff in error, that Robbins *was compelled* to re-lay his *sidewalk*, and that the *plan* of doing the work had been *forced* upon him. And then the counsel says (see Mr. Kale's brief, p. 18) "the court is bound to presume that *this* plan, authorized by the common council, could be carefully executed without the necessity of *such* a *negligent* omission; and Robbins

had the right, as against *the city, which had forced the plan* upon him, to suppose the same thing." Then comes the most extraordinary proposition ever yet made or addressed to a civil tribunal: "But if *the plan*, thus authorized, could not be executed without the commission of a nuisance, then, as it was authorized by law, *the injury* would be *damnum absque injuria.*" (See Mr. Kale's Brief, p. 18.)

Laying aside for one moment the question of fact as to whether "this plan" had been "*forced*" upon Mr. Robbins, the argument is, if "this plan" could not be executed without the commission of a "nuisance," and if Mr. Robbins had committed a nuisance, had dug a pit fall in the street, which was dangerous, and which might result in the death even of his victim, then it was *an injury without a remedy*, and nobody would be to blame.

Believing that this argument of *perfect impunity* and *perfect immunity* is the very best which can be made for the plaintiff in error, we respectfully submit to this Court, that if this theory of the law is correct, then *criminal* negligence, which results in death, becomes *justifiable* homicide, and an individual may take possession of our public thoroughfares whenever and wherever he pleases, excavate and dig them up, and if a stranger should in consequence thereof be injured or get killed, it would be *damnum absque injuria.* If that is law, then it may well be regarded as the *Novum Organum* of modern jurisprudence.

III.

But in the third place, the city of Chicago never "forced" any plan whatever upon Mr. Robbins; they never designed his sidewalk, his area, or his coal vaults. They never told him how or when to build it, and said nothing to him on that subject whatever. He formed his own plans, commenced when he got ready, used his own materials, and all that can be said about the matter, with any show of fairness whatever, is, that the city permitted Mr. Robbins to build up his building, using a portion of the sidewalk as an *appurtenant* to his building, in order to *accommodate him*, and nobody else;

and in consideration of this we say it was *his duty* to see that he kept *his coal vaults* covered up, and *his* premises safe and secure. This was what he undertook to do, and the city warned him, both verbally and in writing, to keep it safely; and in one conversation which he had with the city superintendent, he promised to see to it, but did not. He commenced erecting his building early in the spring of 1856, and "by the middle of May the curb wall and area wall were ready for the flag-stones." Now, another statement I desire to notice here—a statement which is made in both of the printed briefs of the counsel for the plaintiff in error, and that is, that the city interfered with Robbins and compelled him to raise up his sidewalk something like eight inches after it was laid. Now, as a matter of fact, this *was all done by the latter part of September*, and cannot be used as a justification for Mr. Robbins for leaving his area open at all, and counsel are *entirely mistaken* when they say that that had anything whatever to do with the origin of the accident or injury to Woodbury, which occurred nearly two months *after* all his walls had been raised. On page 69 of the Record, Mr. Button testifies as follows:

"Q. What do you know of the curb wall having been raised still higher?

"A. They were raised. *I* raised them for Mr. Robbins.

"Q. When was that?

"A. I think the latter part of September.

"Q. Do you remember how much?

"A. Eight or nine inches."

On page 70 of the Record, Mr. Button says that "the wall was raised *before* the flagging was put down; that is, the sidewalk;" that he got all through and left for the East on the 19th of November, and did not return until the latter part of December, and never heard anything about the accident until the following spring.

Mr. Granger, as before stated, testifies clearly and explicitly about the raising of the curb walls around Mr. Robbins' building, and he says that "it was about August or

September." Now, if Granger and Mr. Button did not know, who does?

The truth is, that all the argument of the counsel in regard to the joint liability of the city is based upon a clear mistake of *the* facts; for, as has been stated above, *at the time of the accident* the city was *not* engaged in doing any work whatever on the street or anywhere around Robbins' building. And I desire the Court to take particular notice of this fact. It is true that the city commenced the work of filling up the street, that is, the carriage-way, early in the spring, just about the time Button commenced to excavate in order to lay the foundation stones; but that *the city finished this work* fully and completely along early in the month of August, and also finished and rendered passable Wells-street bridge and its approaches soon after, and *long before* the accident happened to Woodbury. And this is proven beyond all question by Mr. Button (see page 69 of Record) and by Mr. Granger, the city superintendent, (see page 28 of Record;) indeed, the evidence in this case all shows that the sidewalk was all complete—curb walls and everything about it—on and around the entire building *long before* the accident, with the exception of finishing "*the area*," and there is no pretence or proof whatever that the city was doing anything in the street or about this building, or anywhere in the vicinity of this building, at the time of the accident. But what all this has to do with Robbins leaving his *area* open and unguarded two or three months *after all these things had been done*, we are unable to understand.

The accident occurred on the evening of the 27th of December, 1866. The city filled up the street, and Robbins raised up his sidewalk the summer before.

The arrangement about raising the grade of Robbins' sidewalk was in August, 1856. (See Record, p. 28, Granger's Testimony.)

The space between the curb-wall and the side of Robbins' building was covered with joists, &c., at suggestion of Granger, sometime in July or August. (See Record, p. 29, Granger's Testimony.)

Flagging was laid between middle of August and 1st of October. (See Record, p. 30, Granger's Testimony.)

IV.

The question in regard to contractors, is, we respectfully submit, entirely out of this case, because—

1st. It was shown by the testimony of Mr. Robbins himself, that the contracts had all expired long before the accident, and the presumption of law is that he was doing the work himself by employing his own workmen. (See Record, p. 63, answer to Interrogatory 25.)

2d. We show that Robbins had a man to superintend the work all the time, and not a dollar was paid except on his certificate.

3d. It is shown beyond all question, that *no contractor* had charge of this particular area, and, because Chenoweth, a witness for Robbins, swore, (see Record, p. 77,) that the materials which were used in putting the grating down around the area, were purchased directly from Letz, and that *he* charged the same to Allen Robbins on Letz's books, and he, it will be seen, was Letz's foreman and had charge of the men who were at work on the area up to six o'clock of Saturday night. This testimony, we respectfully submit, shows that Robbins purchased his own materials and hired his own men, and that these men were his servants, and that he paid them, and for this reason the doctrine pertaining to contractors *cannot* apply. But, said Lord Campbell in the case of Ellis *vs.* The Sheffield Gas Consumers, 75 Eng. C. L., 169, when the argument in regard to contractors was addressed to him, "It would be *monstrous* if the party *causing* another to do a thing were exempted from liability merely *because* there was a *contract* between him and the person immediately causing the act to be done."

V.

Something appears in the printed arguments of the counsel for the plaintiff in error which seems to be directed to the fact that it was the duty of the city to erect lamp-posts, and a section of the city charter is quoted. The power to erect lamp-posts is expressly given, but whether the counsel mean to argue that it was the duty of the city to put up lamp-posts *around this particular area* we are not certain; but one thing *is* certain, that the city had before this accident, as the testimony shows, already erected lamp-posts at the proper places for that vicinity—one directly across the street, one at the corner of the alley, and two on the approach to the bridge across the street north from the corner of Robbins' building.

See Gillespee's testimony, Record, p. 19.

Judge Beckwith seems to think, however, that if lights had been put there, especially by Robbins, that it would have been a positive detriment to the public, because, after a full investigation of the subject, he comes to the following conclusion: "Robbins was under no obligation to guard the work by light; he would have been guilty of a *public nuisance* had he undertaken to do so."

See Mr. Beckwith's Brief, p. 12.

Now, if it would have been a "public nuisance" for Robbins to put lights around this area, would the character of "the nuisance" been changed in any way if put there by the city or by anybody else? If it be a nuisance for an individual to guard with lights a dangerous hole which *he has dug* in a public street, then it is high time for the people of this country to know it. As the proposition now stands it certainly *requires* a vast amount of "illumination."

VI.

Now, with these explanations, we respectfully ask the Court to *read the charge of the judge to the jury*, which is

found in full on pages 93 and 94 of the Record, and see if it is not, in view of *the facts* of the case, perfect and complete. The charge condenses the entire evidence, and the only exceptions which were taken to the charge relate, first, to the sufficiency of the notice of the city to Robbins, and second, "to the construction of the area." We desire the Court to mark the language used in regard to this second exception. Neither counsel have set out in their printed arguments the particular errors complained of, but they say in their oral arguments that the second exception means sidewalk instead of area.

The question of notice is, we submit, no longer an open question in this case, because if any point ever was settled that point was settled by this Court in this very case in 1862, but as regards the second exception, we submit that by no use of words in the English language, can the word "area" be made to mean sidewalk. And we respectfully submit that we ought not to be made to argue in regard to a matter which is *so indefinite* that it requires an argument to show what it does mean. That Robbins constructed "the area" stands admitted on this record under the very hand of Robbins himself; (Record, p. 19, see also Brief of Defendant in Error, p. 16.) And as Justice Davis said, in his charge, (Record, p. 94,) "The fact that Robbins was building the area at the same time that the city was grading the street does *not* excuse him, or show that the city was in any degree delinquent. Robbins impliedly agreed with the city that if he were permitted to build the area for *his* own benefit he would do it in such a manner as to save the *public from danger and the city* from harm.

"The gravamen of the offence here is *not* that Robbins was engaged in an unlawful work when he made the area, but that he *left* uncovered and *unprotected* an area which *was* dangerous, and which if left without guards to warn those who passed by, *became* a nuisance. What was originally lawful thereby *became unlawful.* The city cannot be held under any obligation to supervise the building of an area like this under the circumstances detailed in the evidence."

ELLIOTT ANTHONY,

Counsel for Defendant in Error.

Supreme Court of the United States,

DECEMBER TERM, 1866.

ALLEN ROBBINS, Plaintiff in Error,

vs.

THE CITY OF CHICAGO, Defendant in Error.

ARGUMENT OF E. ANTHONY,

For Defendant.

Beach & Barnard, Steam Printers, 14 South Clark St.

Congreve v. Smith 18 N.Y. 102 } Cases cited
Same v. Morgan 18 N.Y.
311-31 Brief another case

SUPREME COURT

—OF THE—

UNITED STATES OF AMERICA.

ALLEN ROBBINS, Plaintiff in Error,

vs.

THE CITY OF CHICAGO, Defendant in Error.

ARGUMENT OF E. ANTHONY,

For Defendant.

CHICAGO:
BEACH & BARNARD, STEAM PRINTERS,
NO. 14 CLARK STREET.

STATEMENT OF CASE.

This was an action of trespass on the case, originally commenced in the Cook County Court of Common Pleas, in the city of Chicago, by the city of Chicago, against Allen Robbins, to recover of said Robbins the amount of a judgment of $15,000 and costs, which the city had been compelled to pay by reason of injuries done to one William H. Woodbury, who had fallen into an open area in the sidewalk, which area and excavation had been made *by the direction of Robbins*, for the purpose of making vaults, and of affording light to the basement of a large iron building, which Robbins was, at that time, constructing at the corner of Wells and South Water streets, in the city of Chicago, and which had been left open and unprotected by Mr. Robbins, or his agents.

Robbins was repeatedly *notified* and *warned* of the dangerous *condition* in which his workmen left the excavation, and he *promised* to see to it or have it seen to; but this he neglected, and on the night of the 28th of December, 1856, Mr. Woodbury, in passing along the street, fell into the open area and was very seriously injured. He sued the city and recovered a judgment for $15,000 and costs, which the city afterwards paid.

The *city notified* Mr. Robbins of the pendency of the suit brought against it by Woodbury, but he failed to defend it. The city defended the suit, but with the result above stated. After *this* suit had been commenced against Mr. Robbins, he filed his petition in the Cook County Court of Common Pleas, alleging that he was a citizen of the state of New York, and the court thereupon transferred the case to the United States Circuit Court. (See page 2 of Record.)

The declaration on pages 1, 2, 3, 4, 5 and 6, contains a history of the case, as is here stated, and claims to recover of Robbins the amount of the judgment, costs, interest and sheriff's fees, $21,551.07.

All of which had been paid by the city of Chicago *on account* of the *fault* and *neglect of Robbins.*

POINTS AND AUTHORITIES.

I.

This case has been in litigation now over eight years. It has been tried *three* times in the Circuit Court, and once in this court. It can be found reported in full in the 2d of Black, page 419.

The questions involved have all been thoroughly argued before this court, and, as we suppose, fully determined.

There is not a single fact or circumstance in *this* record, which differs, in any material or substantial manner, from the case as it appears in the 2d of Black—and unless something is shown to take the case out of the *general rule established* by this court, the questions which are again *sought* to be *discussed* and *reviewed, are no longer* open questions, but must be considered *closed* and the whole case *res adjudicata*.

See particularly *Minnesota Co.* v. *National Co.*
3d Wallace, 333;
The Douro, 3d Wallace, 565–6.

II.

The judgment of Woodbury against the City is conclusive on Robbins.

City of Chicago v. *Robbins*, 2d Black, 419;
City of Boston v. *Worthington*, 10 Gray, 499;
and numerous authorities there cited.

It will be seen by an examination of the record, that it *was admitted*, on the trial in the court below, that Woodbury was injured by falling into an open "area *attached to Robbin's building*"—which

building he was erecting at the corner of Wells street and South Water in the city of Chicago: (p. 19 of record.) It will further appear that Marsh, who, at the time of the accident, and when Woodbury commenced his suit against the city, was city attorney, and was *very intimate* with Robbins, and met him frequently—that he talked with him about the suit of Woodbury and the accident, and that Robbins undertook to procure the testimony of a witness by the name of Livingston, who knew something about the matter; that he promised to write and find out about him, and what he would testify to, and let Marsh know; that Marsh met him, on the day when the suit was to be tried, in the court house as he was coming down the stairs, and told him the case was coming up for trial. Robbins himself admits that he knew that Marsh was city attorney; says he was intimate with him, and knew he was city attorney; says that he talked with Marsh about the accident, and undertook to find out about the witness Livingston; and the evidence all shows that Robbins knew of the pendency of the suit, knew its nature and the court it was in, and when it would be tried; and, in fact, knew all about the case, from beginning to end. Robbins was one of the shrewdest business men that could be found anywhere; and no notice, whether oral or written, could have given him any more information about the suit, or about his rights and duties in the premises, than he possessed, when informed of the commencement of the suit, of its nature and the claim made by Woodbury, and of the trial of the case. Robbins knew, just as well as he knew anything in the world, that Woodbury had fallen into the area of *his* building and been injured; he knew that if it had not been for *his* negligence in leaving that area open, unguarded and unprotected, that Woodbury would not have been hurt; he knew the court in which the case was to be tried; he knew that his liability in the matter was to undergo an examination; and therefore, we say that Robbins cannot, under *such* circumstances, go back of that Woodbury judgment and try the case all over. In short, Robbins was *no stranger* to the proceedings, and he cannot set up any such plea, or make use of any such reasoning. (See testimony of Marsh, p. 34 of record, and Robbins, pp. 64,

65 and 66.) In the case of *Blaisdale* v. *Babcock*, 1 Johns. 519, all the notice that ever was given, was simply a notice that a suit had been commenced; and yet Chancellor KENT, at that time Chief Justice, held the judgment conclusive. See, also,

Bander v. *Fremberger*, 4 Dallas, 436;
Duffield v. *Scott*, 6 Tenn., 366;
Kip v. *Bingham*, 6 Johns., 157;
Leather v. *Poultney*, 4 Binn, 382–386;
Winter v. *Schlatter*, 2 Rawle, 204;
Bond v. *Ward*, 1 Nott., & McCord, 201;
Waldo v. *Long*, 7 Johns-, 173;
Barney v. *Dewey*, 13 Johns., 226,—see this case particularly.
Tarlton v. *Tarlton*, 4 Maule and Sel. 20.

III.

If these positions are not held to be decisive of this appeal, then we submit *again*, for the consideration of the court, the same argument which we made when this case was last before this court, which was as follows:

The city of Chicago, like all other municipal corporations, is *primarily* bound to keep its streets in good order and repair and safe for the *public;* and on this principle, and from *this duty*, it is primarily liable to a stranger for injuries which result to him in traversing the public streets.

Chicago v. *Robbins*, 2 Black, 419;
Browning v. *City of Springfield*, 17 Ill., 143;
Weightman v. *Corporation of Washington*, 1 Black, 139; and numerous other authorities, found in abundance in the Reports in almost every State of the Union.

In other words, if a stranger comes into a city and undertakes to travel over a public street, and while using due diligence receives an injury, by reason of any obstruction, defect, or owing to the dangerous condition of the street, he need not stop to inquire who caused the street to be in such a condition, but may bring his action directly against the city; but as between the city and the party who renders the street dangerous, another principle presents itself, and that is:

IV.

If individuals *so use the streets and highways of a city* that *damage* has resulted to a stranger, which the *city*, by virtue of its general duty to the public, has been obliged to pay, they may and should be *liable over* to the city for all damages which they have caused.

City of Boston v. *Worthington*, 10 Gray, 499;
Lowell v. *The Boston & Lowell R. R. Co.*, 23 *Pick*, 24;
Lowell v. *Short*, 4 Cushing, 275;
Lowell v. *Spaulding*, 4 " 277;
Merrill v. *Inhabitants of Wesbraham*, 11 Gray, 156–7;
Currier v. *Lowell*, 16 Peck, 170;
Althof v. *Wolfe*, 22 N. Y., 264.

The city was guilty of *no* wrong in permitting Robbins to extend his building under the side-walk, and to use the apertures for coal vaults and other purposes; and it was no fault of the city that Robbins' workmen did not cover up the area when they quit work. What Robbins undertook was, to keep his premises safely for strangers to pass by them. It was not only what he undertook to do, but it was *his absolute duty* to see that his premises were kept in a safe condition, so that any stranger could pass along there without being precipitated into a pit-fall and getting maimed or killed.

In the case at bar, the proof shows that the fault was all the fault of Robbins. The wrong on the part of the city, so far as Woodbury

was concerned, was merely *constructive*, and takes its rise solely from its *public* duty; that is, its duty to keep its streets safe for travelers. If a citizen renders them unsafe, and the city suffers in consequence thereof, it can always insist upon being indemnified by the author of the mischief, who ever he is and whenever found. If any other rule was to prevail, the city would become nothing but a great insurance company—insuring everybody that entered it, against not only the acts of its own servants and agents, but against all the acts of carelessness and negligence of all the people who live in the city, without the slightest regard to who they were, or what they did, or what they left undone.

The city, therefore, having been compelled to pay for a constructive wrong, have their remedy over against the actual wrong doer.

1 Black's Com., 431; 2 Stark Ev., 768, 769.

Robbins cannot say that the city is barred by their negligence, for, in the absence of actual negligence, the city may be held liable on the ground of its duty to the public; but, as *between the city and Robbins, that question cannot arise*, for Robbins had the charge and control over the place where the injury took place. He not only dug the hole, but he carelessly left it open, unguarded and unprotected. The city were not constructing vaults under the side-walk at the time when the accident occurred, but Robbins was. He it was that made the excavation under the side-walk for his own use and benefit, and then, when *he* has so used it as to produce an injury to a citizen, he has the effrontery to turn around and say, that he was under no obligation whatever to keep this dangerous excavation covered, but the city is wholly to blame. We submit that such a position is neither just or honest. The city was in no sense *particeps criminis*, and we say that Robbins is estopped from setting up any such defence.

Lowell v. *Boston & Lowell R. R. Co.*, 23 Pick, 32
—see especially pages 33 and 34, where this whole subject is finely illustrated and explained;
White v. *Franklin Bank*, 22 Pick., 181;
Worcester v. *Eaton*, 11 Mass., 377.

In the case of *Willard* v. *Newberry*, 22 Vt., 465, the court cite with approbation the case of *Lowell* v. *Boston & Lowell R. R. Co.*, 23 Pick., and say that that "decision seems to us to be founded in reason and is directly in point." See also, particularly,

Willey v. *Portsmouth*, 35 N. H., 313;
Elliott v. *Concord*, 7 Foster, 204;
Batty v. *Duxbury*, 24 Vt., 155.

In this last case the court say, (page 163 and 164): "There is in law no necessary privity between the *traveller* and any one but *the town*, as to the sufficiency of the highways. The towns *must look to those who obstruct their highways*, and take measures to obtain redress for such injuries."

Newberry v. *Conn. & Pass. Rivers R. R. Co.*, 25 Vt., 384;
Hampden v. *New Haven & Northampton Co.*, 27 Conn., 166-7—the reasoning in this case is directly in point;
City of Lowell v. *Short*, 4 Cush., 276-7;
City of Lowell v. *Spaulding*, 4 Cush., 277-8.

In the case of *Kirby* v. *Boylston Market Association*, 14 Gray, 251, the court say that "individuals who sustain injuries or suffer loss and damage peculiar and special to themselves, from nuisances created or obstructions unlawfully placed by another in a public highway, may maintain an action against him to recover compensation therefor. The defendants therefore are plainly liable to the plaintiff, if they, in any way, *created or caused* a public nuisance *in the highway adjacent* to their estate, by means of which he, while using due care for his own protection and safety, suffered the injury to his person of which he complains."

Bacon v. *Boston*, 3 Cush., 174:—This was a case where a party fell through an aperture in the side-walk, and was injured. The court held to the same principle, that, while an individual might be allowed

to make use of a portion of the highway devoted to the public use,—and the city, in the duty it owed the public to keep its streets safe, might be liable, *yet it did not debar the city from holding the individual responsible.*

Palmer v. *Portsmouth*, 43 N., 269.

V.

Did Robbins so use his premises and the street, as to cause the injury to Woodbury, and thereby make himself liable?

The declaration charges the defendant with making *this* pit or hole in the street or highway, and *suffering* "the said pit or hole *to remain*" wholly *uncovered and unguard d*, and without any sign or warning of danger to the persons passing along the said street or highway, by means of and in consequence of which, said negligence and improper conduct of the said defendant in that respect, etc.—one William H. Woodbury, then and there was lawfully passing along the said street, and exercising ordinary care and prudence for his personal safety, fell into this hole and was greatly injured," &c. The declaration then details the history of the suit brought against the city by Woodbury, and the recovery of a judgment against the city in consequence of Robbins' negligence in not keeping secure that portion of the street which he, Robbins, was using *for his premises*, and which was at the time under his charge and control, etc. See narr. on pages 1, 2, 3 and 4, of Record.

To prove the allegations in this narrative, the plaintiffs introduced the record of the Woodbury case; the city comptroller, who showed that the city had paid the judgment which Woodbury obtained against the city, together with the interest and costs, and then introduced, 1st:

M. M. Gillespie, a witness for plaintiff, who stated that he has resided in Chicago since February, 1856. That in 1856 he was in Gibbs &

Griffins' warehouse, on the North side, during the fall and winter. That he at that time boarded at No. 195 Washington street, and was acquainted with William H. Woodbury. That he knows the iron building on the corner of Wells street and South Water street: it was erected in the summer of 1856. That he had been in the habit of passing there two, three, or four times a day, and that he first saw Woodbury on the west side of Wells street bridge. He was coming across from the North to the South side. That witness was walking three or four rods behind him, going the same way. This was *in December*, 1856, *in the evening*, between 8 or 9 o'clock, and was Sunday evening. It was cold and it snowed. Woodbury came across on the West side of the bridge, and then crossed over to the south-east corner of Wells and South Water streets. He was going ahead of witness. That witness looked down a moment and he was gone. That he last saw Woodbury near the corner of the building and going South, and that he then supposed he had fallen into the area. That he ran up to where he was. Woodbury hallooed for help. Witness then ran for a ladder and got him out. The side-walk was laid with flagstones. Grates had been laid across the area between the flagging and the building for eighteen or twenty feet, level with the side-walk; *a space was then open where the grates ended, all the way. I think to the end of the building. The excavation was about eight feet deep—seven or eight, may be more.* Witness got him out on to the side-walk. He said he felt faint. Witness went with him along to the corner of Wells and Lake street, when he said he felt better. Never saw him before. Saw him afterwards two or three times at the Tremont House—before the trial. On cross-examination he stated that he saw him as he went on to the sidewalk. He *was facing the storm*. There was a lamp on the west side of Wells street, at the corner of the alley. I saw him down in *the area*. I think if I was looking at it I could see the open area, although if a man did not know about it, it might be difficult to see the hole. There was some snow on the grates. Not much had fallen, but it was blowing about.

2. Mr. Granger, *the city superintendent* at the time of the accident, being sworn, stated that he resided on Indiana street, between

Wells and Franklin, on the North side. On going to the South side of the city, I usually pass over Wells street bridge, when we had a bridge there. I passed over then from four to six times a day. I was in the habit of passing Robbins' building frequently during its erection. I *saw defendant* several times about this building during its erection, which was during the year 1856. There was an excavation of a portion of Wells street, near the building. I think the excavation was a little lower than the foundation stone. In the street from his line out, there was a walk erected to what we call the *curb wall;* there was a wall for the center portion of the sidewalk to rest upon: also a wall between that and the building called *the area wall*, I believe. That is the wall which sustains the inner end of the flagging stones. I should think the *area was seven or eight feet in depth;* the walls perhaps the same height. There must have been some of the natural earth taken off that. *From the inner end* of the flagging, there was *a space left open*, I should judge from four to five feet. It extended the whole length of the building before any portion of it was covered. This was along Wells street. The sidewalk was about sixteen feet wide. This would make the flagging about eleven or twelve feet wide. The *area between the flagging and the building was not covered as soon* as the flagging was laid down. This space was to be used by Robbins for coal vaults. Before the flagging was laid down, *the entire space was open. I had conversations with defendant in relation to the dangerous character of that opening. I advised him to cover it up, and* NOTIFIED *him that I considered it dangerous to leave it in the condition that it was and had been before that,* and my impression is, *I directed him how he could do it very cheaply.* Mr. Robbins *was aware at the time that I was city superintendent. I had told him before that. I had several conversations with him relative to the work on the street* in front of it. In giving him notice of its dangerous character, the substance of what I said to him was, that I considered it dangerous if it should be sleety. A person passing rapidly, or a drunken person, might fall in, or slip in, and to guard against any accident of that kind, for I thought the city might have damages to pay, or something to that effect. Had conversations

with him, as to the danger of this hole, once or twice—before the flagging was down—and after the curb walls were up, and planks were laid down. I *had a talk* with him about the planks several times. Mr. Granger then stated that his official duties called him frequently to this building, and that after he had told Robbins about the dangerous character of the hole that he was leaving alongside of his building, that it was covered up for a while; but that when Robbins commenced to put down his grating, the boards and joists were removed. He himself had put down planks several times. Sometimes *I carried* plank and throwed it on if there was a place open.

I gave him notice as superintendent, because I considered it my duty to do so. I gave it in my character as city superintendent. Elias Shipman was chief clerk in my office. When I told Robbins that it was dangerous, I think his reply was, that it was more the contractor's business, but *that he would speak to him.* Page 21, 22, 23 24, 25 and 26, of Record.

On the cross-examination, Mr. Granger stated that the *area* and open space between the building and the curb wall, was *created* by the building up of the walls. The inside area wall had nothing to do with the outside curb wall. My impression is that the *flagging* was laid between the middle of August and the 1st of October. It must have been something later before it was all down. I think the *area was not all covered after* the flagging was laid. There were planks laying into the doors, but not covered. Planking was laid into the doors as gangways, but it was not covered the whole length of the way.—All Record, from page 21 to 31.

Elias Shipman, a witness for plaintiff, stated that he resided in Chicago in 1856, and that he was head clerk in Granger's office; knew Robbins by sight, and the buildings; lived with Granger on the North side, *and passed* the premises four times, and usually six times a day. The *flagging* on Wells street was commenced at the east end

sometime in September, may be a little later. It *was completed about the 1st of November*, I think, on both fronts. *The area was usually entirely open until* the grating was all done. *Some time after the flagging was done*, and before the concrete floor of the area was laid, *I was present at a conversation between Granger and Robbins, exactly at the corner of the building—north west corner of said building. Granger spoke about the danger of the area being open; that it was dangerous.* Don't pretend to speak with accuracy as to the language; Granger said somebody's neck or limb would be broken, or paid for. The substance was that ROBBINS *said that he would see to it. By direction* of Mr. Granger, before this, *I wrote him a note and put it in the Post Office, notifying him of the danger of the area.* I recollect that Mr. Granger and myself picked up a plank there, and put it across the end at the corner; *have pretty distinct recollection of doing it more than once;* found them afterwards removed. There used to be a gang plank running from the side-walk to the building. *I din't remember ever* seeing the area covered till it was covered by grating. I saw the defendant frequently. Presume he was in the city while the building was being built.

In his cross-examination, Mr. Shipman further stated, that "*the area had been left open, as they finished the flagging, all along. It was open till after the accident. The notice was sent two or three weeks before this*, perhaps before the flagging was laid. The notice had reference to the whole front, not the area particularly. The *area* was *not* covered, to my recollection, properly. I think very likely there were barriers *part* of the time. Know that barriers are frequently stole; carried away at night. I think the steps to the area were not finished at the time of the conversation. Lamps were at bridge, and lamp at alley, sixty-four feet from the building.

On cross-examination, said:—Never knew of any barriers being put up. Think the flagging was not all down when I sent the notice.

The testimony of Dox, on pages 36, 37, and 38, is to the effect

that he and Gillespie took a walk, on Sunday afternoon, the 28th of December, the day on which the accident occurred. Passed this building about 3 o'clock in the afternoon. That *the area* was at that time open. The testimony of O. J. Rose is to the same effect.

The testimony of De Golyer, page 46 of Record; of Wolcott, page 48 and 49 of Record, and of O. J. Rose, on page 57, 58 and 59, is perfectly overwhelming as to the dangerous condition in which Robbins had left "his area" on that fatal Sunday, the 28th of December, 1856, and we especially commend to the attention of the court, the testimony of Mr. Rose, who was city treasurer at that time, and who had an office near this building, and passed there three or four times a day each day. Was not all *this* evidence, competent evidence to be submitted to jury, under instructions of the court?—and will this court say that the verdict of the jury, upon all these facts, was erroneous?

See especially, *Nelson* v. *Godfrey*, 12 Ill., 20, and *Chicago City* v. *Robbins*, 2 Black, 427. We ask the court to examine the case in 12th of Illinois, particularly.

VI.

The area was part of the plan which Robbins adopted; it was attached to his building; was made by him for his own use and purposes, and he left it open---unguarded and unprotected---and it was into this area that Woodbury fell and was injured.

At the commencement of the trial, it was stipulated that the testimony of several witnesses, who had given their testimony on the for-

mer trial, and which appeared in the printed record of the Supreme Court, might be read on this trial, and consequently the testimony of Gillespie, Shipman, and Col. Speed, were read from the record.

It was also admitted by the defendant, that "*the place* where "William H. Woodbury *was injured*, was near the corner of Wells "and South Water streets, in the city of Chicago, and that *the* "*area* into which Woodbury fell, was *attached to the building owned by Allen Robbins*, and *was then being erected by him.*" (See page 19 of Record.) It is also admitted that *this* area, although *attached* to the building of Robbins, was in the street—that is, it formed a *part* of the public *side-walk*, and was *designed* to be covered over with grating and used for coal vaults, and other purposes.

This, when taken in connection with the other testimony, was an admission of Robbins' liability.

John M. Van Osdell, a witness for the plaintiff, testified:—That he is an architect, and *designed the building for Robbins*, and also *superintended its erection*. The excavation under the side-walk *was designed as vaults for coal*. The *excavation was under the whole of the side-walk on both streets*. The depth of this area, from the top of the grating, or the top of the side-walk, was *seven feet eleven inches*. This distance is *from the top of the side-walk to the floor of the area*. Mr. Robbins was about the building at the time the work was going on. The excavation and the work upon the area, or the curb walls, was being done by Robbins himself. I certified to Mr. Robbins, upon which he made payments for that work. *It was a part of the design to make the excavation under the side-walk*. Mr. Robbins was aware of it and saw it being done. *The work was superintended by me* as architect for *Mr. Robbins*—and the building, and all the appurtenances, including the area, were erected in accordance with *the plan*.

Cross-examination by defendant:—The excavation was done by digging and throwing the earth into wagons. The whole surface

under the side-walk was excavated to the same depth as the lot itself. I never measured how much was taken off the surface of the ground, but my recollection is, it was not more than eighteen inches in the average. Perhaps on Wells street, at the south east corner, it was deeper. The lot had been filled in by rubbish. There was a bed of three inches of sand laid upon the bottom of the excavation, and three inch flagging, raising the surface six inches; making the original excavation, as reduced, twelve inches. The cause of the open space was the excavation, and the building of the curb wall. My recollection is, that the curb wall was built before there was any filling in of the street. It was one of the first things that was done. The Nicholson pavement was put down upon the street sometime during the summer or fall. I think it was put down before this accident to Woodbury.

Direct examination resumed:—I called upon Mr. Greely, city surveyor, as the superintendent of Mr. Robbins, for the height of the wall, which he gave. I had the wall erected for Mr. Robbins accordingly. The wall was raised eight inches higher afterward, on account of the approach of the bridge. *I directed it to be made eight inches higher. All this was done; the streets filled and the walls built, and these extra eight inches put on before the flagging was laid.*

By defendant's counsel:—The curb walls now are built by order of the city; at that time they were built at the option of the owner of the building.

By plaintiff's counsel:—At all events, whatever might have been the practice, *these curb walls were built by order of Mr. Robbins.*—See particularly the testimony of Van Osdell, on pages 50 and 51 of Record.

In *Firmstone* v. *Wheely*, 2 D. & L., 208, POLLOCK, C. B., says:—"Suppose a person digs so near a highway as to render it dangerous,

unless fenced by day and lighted by night, that might be a trespass but there being also a duty to guard the public, a person injured would have a right to sue in the case.

In *Lynch* v. *Nerdin*, 1 Q. B., 29; 4 P. & D., 572, Lord DENMAN said:—"If I am guilty of negligence in leaving anything dangerous in a place where I know it to be extremely probable that some other person will unjustifiably set it in motion, to the injury of a third, and if that injury should be so brought about, I presume that the sufferer might have redress by action against both or either of the two, but unquestionably against the *first*."

Cleghorn v. *Taylor*, 18 D. page 664; 28 J. page 287;
Hay on Liability, page 243.

Barnes v. *Ward*, 9 Manning & Scott, 420, is directly in point;

Hardcastle v. *South Yorkshire Railway Co.*, 28 L. J. Excheq. 139;

Coupland v. *Hordingham*, 3 Campb., 398;

Hale v. *Slellingbourne & Sheerness Railway Co.*, 6 Hurlstone & Norman's Ex. Rept., 497;

Allen et al. v. *Mack*, 10 S. D. p. 349; found in Hay, on Liabitity, p. 45, was where a pit was near the highway, unprotected, and a horse walked off into, and was killed, and the owner was liable, although it was shown that he had leased it to tenants, who had it at that time in their possession.

Hislop v. *Durham*, D. vol. 20, p. 1168. See Hay on Liability, page 77.

Randleson v. *Murray*—8 Adol & Ellis, 109—which was a case where the occupiers of a bonded warehouse employed a master porter to remove various barrels, and he used his own tackle and men, and injury occurred in the course of the work, yet the defendant was held liable.

In *Reedie* v. *North West. R. Co.*,—4 Exch., 243–255,—the court says (Rolfe B) that there is no distinction between fixed and personal property, except in cases of *nuisance.*

Bacon's Abridgment—Highways—"D," says that "it is clearly agreed to be a nuisance to dig a ditch or make a hedge overthwart the highway, or to erect a new gate or to lay logs of timber on it, or, generally, *to do any other act which will render it less commodious.*"

The real question which *this* case presents is this: Is the owner of a lot of land who undertakes to build a building, and who, *for his own use and benefit*, goes into a public street in a great city and digs a deep and dangerous hole, and when said hole is dug, leaves the *same open, unguarded and unprotected*, so that a *stranger*, in walking along, falls into the same and gets injured, responsible for his careless, reckless act, or not?

And, upon this point, I submit that the current of English and American authorities is almost unbroken; and while there may be found many cases which hold that the *contractor* is liable for the immediate acts of his servants and workmen, while actually employed in the execution of a particular work, yet there are but few, if any, cases which excuse the owner of real estate from liability where he creates causes or continues any thing amounting to a nuisance, simply because he had made a *contract* with independent contractors for the same.

The cases upon this point are numerous, and I will only call attention to a few of the most recent and leading cases upon this subject:

NEW YORK—

Nota Bene.	*Storrs* v. *City of Utica*, 17 N. Y., 108;
" "	*Congreve* v. *Smith*, 18 N. Y., 102;
" "	*Congreve* v. *Morgan*, 18 N. Y., 85;
	Bailey v. *Mayor of New York*, 3 Hill, 543;
	Dygert v. *Schenck*, 22 Wend., 447;
	Mayor of New York v. *Bailey*, 2 Denio, 444.

The opinion of the court in the case of Storrs, 17 N. Y., and the two cases in the 19 N. Y., we regard as perfectly conclusive.

Hart v. *Mayor of New York*, 9 Wend., 607;
Harlon v. *Humiston*, 6 Cowen, 191;
Lansing v. *Smith*, 8 Cowen, 152;
City of Buffalo v. *Halloway*, 3 Selden, 493.

Judge COMSTOCK, in *Storrs* v. *City of Utica*, 17 New York, 106–7, points out the true doctrine which is contended for, and shows that the injuries which constituted the cause of action in the cases of *Blake* v. *Ferris*, 1 Selden, 48, in *Pack* v. *Mayor of New York*, 4 Selden, 227, and *Kelly* v. *Mayor of New York*, 1 Kernan, 435, arose by *acts* of workmen while *in the actual performance* of work, while in the case at bar they did not.

In the case of *Vanderpall* v. *Husson*, 28 Barbour, 198, Justice HOGEBOOM says:

"The general rule is, that where the work is done under a contract, "and the injury occurs from the act or negligence of the servants of "the contractor, and not those of the owner, the owner is not respon- "sible"—quoting cases.

"But there are EXCEPTIONS to the general rule where *the work* or "execution is itself a nuisance, or where the injury was itself a neces- "sary result of the contract, and in some cases not material to be "noticed."

Stevens v. *Armstrong*, 2 Selden, 436;
City of Buffalo v. *Holloway*, 3 Selden, 493;
Congreve v. *Morgan*, 5 Duer., 495.

ILLINOIS—

Nelson v. *Godfrey*, 12 Ill., 20;
Lesher v. *The Wabash Nav. Co.*, 14 Ill., 85;
Johnson v. *Barber*, 5 Gil., 430;

Hinde v. *The Wabash Nav. Co.*, 15 Ill., 85;
Chicago, St. Paul & Fon Du Lac R. R. Co., 20 Ill., 386.

The case of *Scammon* v. *City of Chicago*, 25 Ill., 438, which is cited by defendant and relied on, is not of as much weight as the former cases; because, as will be shown by the slightest examination of those cases—that it misstates both the grounds of the decision and the facts in several very important particulars—and as a comment on that decision, see opinion of Judge COMSTOCK, in *Storrs* v. *City of Utica*, 17 N. Y., p. 108.

PENNSYLVANIA—

Shaw v. *Reed*, 9 Watts & Serg., 72.

NORTH CAROLINA—

Wiswall v. *Branson*, 10 Iredell, 555, and especially the opinion of RUFFIN, who, although he delivered a dissenting opinion, most ably sustains the doctrine contended for by the plaintiff in error in *this* case.

VERMONT—

Brown v. *Lent*, 20 Vt., 529;
Hill v. *Morley*, 26 Vt., 178.

MASSACHUSETTS—

Lowell v. *Boston & Lowell R. R. Co.*, 23 Pick., 35;
Thayer v. *City of Boston*, 19 Pick., 516;
Stone v. *Cadman*, 15 Pick., 297;
Earle v. *Hall*, 2 Met., 353;
Gray v. *Portland Bank*, 3 Mass., 385.

U. S. COURT—

Phil. & Reading R. R. Co. v. *Derby*, 14 Howard, 486—decided by Justice GRIER.

The case of *Clark* v. *Fry*—8 Ohio, 359—is referred to, among others, by the defendant, as an authority in his favor; but if that case is examined closely, it will be found that the court distinctly recognize the doctrine, that where anything is to be done under a contract, which is itself unlawful or *necessarily injurious* to a third person, the *employer*, as well as employee, would be liable for any injury resulting therefrom.

See, also, *Burgess* v. *Gray*, 50 Eng. C. L. 579, 1 M. G. & S., 578.

In the case of *Laugher* v. *Pointer*, 5 Barn. & Cress, 560, Justice LITTLEDALE lays down this rule: "In all cases, where a man is in possession of fixed property, he must take care that the property is so used and managed that other persons are not injured, *and that whether his property be managed by his own immediate servants or by contractors*, or their servants. The injuries done upon land or buildings are in the nature of nuisances, for which the occupier ought to be chargeable, when occasioned by any acts of persons whom he brings upon the premises. The use of the premises is confined, by law, to himself, and he should take care not to bring persons there who do mischief to others.

If any person *contract* with another to perform work, and in the course of doing it, a *nuisance is created*, the *employer*, the *person who caused* the *work to be done*, is liable, and not *merely* the hand that did it.

King v. *Dewdrop*, 16 East., 194.

The case of *Ellis* v. *The Sheffield Gas-Consumers*, 75 Eng. C. L. 169—decided 1853—is another case particularly applicable to the case at bar; and Lord CAMPBELL, in his opinion, explodes the whole doctrine that is contended for by the defendant in this case. That case was this: The Gas Company made a *contract* with Watson Brothers, to dig trenches in the streets of Sheffield, to lay down gas pipes; and, in doing so, the servants of Watson Brothers left a heap of stones and earth upon the footway, and the plaintiff, in passing along the street, fell over them and broke her arm.

Lord CAMPBELL said, that "they employed Watson Brothers to "break up the streets, and in doing so, to heap up earth and stones, "so as to be a public nuisance; and it was in consequence of this be- "ing done by their order, that the plaintiff sustained damages. It "would be *monstrous* if the party *causing* another to do a thing, "were exempted from liability, merely *because* there was a *contract* "between him and the person immediately causing the act to be "done."

WIGHTMAN, J., said: "But for the direction to break up the "streets, the accident could not have happened; and though it *may* "*be* that if the workmen employed, had been careful in the way in "which they heaped up the earth and stones, the plaintiff would have "avoided them; still, I think the nuisance, which the defendants *em-* "*ployed the contractors* to commit, was the *primary cause* of the "accident."

And I say in regard to all the cases cited by the defendant in error, as Justice EARLE said, in his opinion, that "the *cause* of the *accident* "was the *very thing* done in pursuance of the specific directions of "the defendants contained in the contract, and that, in my opinion, "makes the distinction between the *present case* and those *cited*, in "which the cause of the accident was the negligence of those doing "the thing, *not* in the *thing itself*."

In *Newton* v. *Ellis*, 85 Eng. C. L. 115, decided 1855; which was an action brought against the defendant, who had contracted with a local board of health, to dig wells for them, according to a specification proposed by the surveyor, as follows: "The whole work to be "done to the satisfaction of the Holreace Local Board of Health, or "their surveyor, or whom he may appoint; and the digging out "thereof is to be done entirely under the direction of the surveyor; "and the whole of the works to be completed by the 11th day of "October next." And the defendant had commenced digging the well in the highway, and left it at night unguarded and unprotected; in consequence of which an injury took place to a traveler. It was

held, that a contractor, under *such circumstances*, and under such a contract, represented the company, and would be held to have done their work under *their direction*. See opinions of the court on page 123, and especially that of EARLE, J. on page 124.

Quarman v. *Burnett*, 5 M. & W., 499. See particularly the opinion of PARKE, B., in which he recognizes the doctrine that, if the owner of fixed property causes acts to be done, which amount to *nuisances*, he would be liable, whether he managed it by his own immediate servants, or by contractors or their own servants.

Redie v. *London & Northwest Railway Co.*, 4 Exchequer, 943, was a case where the accident happened by the carelessness of a workman, in letting fall a stone upon a passer by, while employed upon the work, and is *most clearly* distinguishable from the case at bar.

In *Laugher* v. *Pointer*, 5 B. & C., 547, LITTLEDALE recognized the liability of the owner of real estate for injuries done, in consequence of the creation of *nuisances*, or the performance of acts thereon which produce injury to third persons.

In the case of *Redie* v. *London & Northwestern Railway Co.*, ROLFE, B., in delivering the opinion of the court, said, "on full con-"sideration we have come to the conclusion that there is no such dis-"tinction, unless, perhaps, where the act complained of is such as "*amount* to a *nuisance*." And in the argument of the case of *Knight* v. *Fox*, 5 Ex. 723, PARKE, B., said, "That means a nuisance "as connected with a man's house or with his fixed property."

The real distinction, in all this class of cases, is finely stated by WILDE, B., in the case of *Hole* v. *Sittinghousne & Thames R. R. Co.*, found in vol. 9, No. 13, of the Weekly Reporter, published in London. The case was similar to the one at bar, and on deciding it he said:

"The real distinction in these cases is this: When the injury is "occasioned by the negligent act of a servant of the contractor, col- "lateral to the execution of the work, which the contractor is en- "gaged to perform, then the contractor, his master, is liable; but if "the injury, by the doing that which the contractor was employed to "do, the person who employed him is responsible; in other words, "where the mischief arises from the improper or defective doing of "that which is ordered, the person ordering the doing of it is answer- "able. Here the defendants employed the contractor to build a bridge, "and it was so made as to be an obstruction to the navigation. Al- "though it may be that what the contractor did was an insufficient "carrying out of the delegated authority, still it was done under and "pursuant to that authority, and consequences are the same as if the "defendants had themselves done the act. It is the same in princi- "ple as the case of a person requiring another to set up a structure, "which is regarded by the law as a nuisance; *then the person order-* "*ing it to be done would be responsible.* It is no answer for the "defendants to say, 'we *did not order it to be so done as to constitute* "*it a nuisance*'; it is sufficient that they *ordered the doing of the* "*act*, and that it *was a nuisance.*

VII.

To leave open and unprotected an area like the one in question, constituted it, 1st, not only a nuisance, but 2d, a continuing nuisance.

HE EXCAVATION WAS A NUISANCE, *per se.*

The excavation, which caused the injury, was made in the side-walk of a public street in the city of Chicago—was about one hundred feet in length, four feet in width, and eight feet deep—and was a part of a *plan* of Robbins, deliberately formed, by which he sought to derive benefit and advantage to himself, by encroaching upon and

occupying a portion of the street, which plan was prepared by the architect of Robbins, and *adopted* by him; and the excavation made and building erected by him, and under the direct supervision of his agent, John M. Van Osdell. The evidence of Van Osdell on that point, (see gage 19 of Record,) is as follows:—"I am an architect. "I know the building at the corner of Wells and South Water streets. "I *superintended* its erection *for Mr. Robbins.* I prepared the "plans, have the plan of the basement story here. [Exhibits the "plan.] These plans were adopted by Robbins. It *called for the* "*excavation in the side-walk* and the area. In addition to furnish- "ing plans, I *superintended* the erection of the building. The build- "ing was erected for Robbins; *gave him the certificate for payment.* "Saw Robbins at the building occasionally; during the whole sum- "mer. He *was aware* that excavations were to be made in the side- "walk, and was there while the excavations were going on."

The attention of the court is specially called to case of *Barnes* v. *Word*, 9 M. & Scott, 420.

Robbins *never had any authority* whatever from the city authorities, to make the excavation, and after the excavations were made, it was left open, *unguarded and unprotected* by Robbins, who was repeatedly notified of its dangerous condition, but who neglected or refused to protect the same, in consequence of which, the accident happened, and the injury occurred.

It is respectfully submitted to this court,

FIRST,—That to dig such a hole in the streets of a city, *without authority*, was unlawful; and to leave it open, unguarded and unprotected, was a most reckless and careless act, and constituted the excavation a *nuisance*, for which Robbins should be held liable for all damages arising from digging of the same.

Any act of an individual, done to a highway, though performed on

his own soil, if it detract from the safety of travelers, is a nuisance.

Dygert v. *Schenck*, 23 Wend., 447.
Hart v. *Mayor of N. Y.*, 9 Wendell., 607.
Coke v. *Birge*, 9 Georgia, 426.
Viner's Abr., title Nuisance; and Blackstone's Commentaries, Bacon's Abridgement, title Nuisance.

A ditch dug in the public highways is a nuisance.

Dygert v. *Scheuck*, 23 Wend. 447.
Barlow v. *Humiston*, 6 Cowen, 191.
Lansing v. *Smith*, 8 Cowen, 152.

"There is no doubt but that *all injuries whatsoever*, to a highway, "as by digging a ditch, or making a hedge across it, or laying logs of "timber in it, or doing any other act which will render it less commo- "dious to the King's subjects, are public nuisances at common law."

1 Russell on Crimes, 347.
1 Hawk, P. C., ch. 76, sec. 144.
1 Common Law Report, 920.
Angel on Highways, p. 199.
Jarvis v. *Dean*, 11 Moore, 354—fell down an area.
6 Jurist, part 1, (1860) page 604.
Reg v. *The Longton Gas Co.*,

Nota Bene—*Barnes* v. *Ward*, 9 Man. & Scott's, 420.
Coupland v. *Hardingbour*, 3 Camp., 378.

An obstruction, endangering the public travel, would be a *nuisance*, for which the party placing it there would be liable in damages, in case any injury should be caused by it.

Hamden v. *New Haven and North County*, 27 Conn., 167.
City of Providence v. *Clapp*, 17 How, 169.

By the common law, *every encroachment* or incumbrance upon a highway, by which it is rendered less commodious to the people, is a public nuisance, and may be removed by any individual.

Burnham v. *Hotchkiss*, 14 Conn., 311.
1 Hawk. P. C., 312, 214.
4 Burn's Just., 170, 484.

"A nuisance," says Blackstone, "is anything which worketh hurt "to the citizens at large."

3 Blackstone's Com., 311.
Fowler v. *Sanders*, Cro. Jac., 446.

Nota Bene—6 East., 427.

SECOND.—"Every owner of real estate is bound to prevent nui- "sances on his own premises, which are created in the course of "doing work there for him by anybody or on any terms; for he has "no more right to allow others to erect nuisances on his premises, "than to do it himself."

6 Espinase, 6.
Wiswall v. *Brinson*, 10 Iredell, 565.
Bush v. *Steinman*, 1 Bos. & Pull., 404.
2 Salkeld, 460.
Laugher v. *Pointer*, 5 Barn. Cres., 547.
(especially and particularly the opinion of LITTLEDALE.)
Rapson v. *Corbett*, 9 M. & W. 710.
Burgess v. *Gray*, 1 Com. B. 578.
22 Ohio, 536.
Sadler v. *Henlock*, 30 Eng. Law & Eq. 167.

Nota Bene—*Samyn* v. *McCosky*, 2 Ohio N. S. 536.
Stone v. *Cadman*, 15 Pick. 297.

Nota Bene—*Linsley* v. *Bushnell*, 15 Conn. 237.
Gardner v. *Heartt*, 2 Barb. 155.

AFTER THE EXCAVATION WAS DUG, IT WAS LEFT OPEN, UNGUARDED AND UNPROTECTED, AND ROBBINS KNEW IT. THIS MADE IT A CONTINUING NUISANCE.

Where a nuisance is erected or continued by the property of an individual, whether that property be animate or inanimate, real or personal, and during the continuance of that nuisance, he claims or exercises acts of ownership over it, he is liable for any injury occasioned by such nuisance, especially when he *neglects to remove it after reasonable notice.*

A man must take such care of property owned by him, and subject to his control, that another will not be exposed to injury by it. "*Sic utere tuo ut alienum non laedas.*"

Nor is it necessary, to make the defendant liable, that he should have done any positive act; if he leave *undone* that which he *ought* to do, and an injury ensues, he must answer for it.

Linsley v. *Bushnell*, 15 Conn., 237, 289.

This case is directly in point.

Lesley v. *Pounds*, 4 Taunton, 649.
Bull, N. P. 25, 75.
Dicon v. Bell, 1 Stark Ca., 287.
1 Stark Ca., 189.
1 Bing. 213.
1 Chitty, 95.

CONNECTICUT—

Hamden v. *New Haven & Northampton Co.*, 27 Conn., 166.

fendant had personally interfered in the matter, was that of a policeman, who stated that upon observing the heaps left on the road side opposite the defendant's premises, he called the defendant's attention to it, and told him it must be taken away. Whereupon the defendant said he would remove it as soon as he could. This was taken by all of the court to be an admission that he was exercising dominion over it. (See page 500.)

The argument of Sergt. TALFOURD is a concise and masterly statement of the law upon the subject, which was followed by the court, in their decision of the case; and his review of the English cases, points out clearly the *distinction* which is contended for in *this case.*

See also, *Randleson* v. *Murray*, 35 Eng. C. L. 343, (*Nota Bene*) decided 1838, (8 Ad. & Ellis, 109.) This was a case where a warehouseman at Liverpool employed a master porter to remove a barrel from his warehouse. The master porter employed his own men and tackle; and through the negligence of the men, the tackle failed, and the barrel fell and injured plaintiff. Held, that the warehouseman was liable in case for the injury.

See also particularly *Matthews* v. *West London Waterworks Co.*, 3 Campb. 402, and authorities above cited.

9 Man. & Scott, 420, decided 1843.
45 Eng., C. L., 303.
Hay on Liability, 243.

See especially, and particularly, the opinion of Judge COMSTOCK in the *Mayor of Albany* v. *Creniff*, 2 Comstock, page 180. Also,

Congreve v. *Smith*, 18 N. Y., 83;
Congreve v. *Morgan*, 18 N. Y., 85.

The case of *Boswell* v. *Laird & Chambers*—8 California, 493—is also referred to as being in point for the defendant; but the court in that case, after quoting various cases in regard to the subject of contractors, say:

" If the injury complained of arose not from the manner in which " the embankment or dam was constructed, but from the fact that it " was constructed at all—that is, if it was a structure amounting " to a nuisance, liability therefor would attach equally to Laird and " Chambers, and the contractors, Moore and Foss.

" The authorities limit the liability to cases where structures amount- " ing to nuisance, are erected on or near, and in respect to fixed pro- " perty of the owner, and place the liability on the ground that every " man is bound to use and manage his own property so as not to in- " jure others; when the structure is erected by *permission* of the " owner, there is reason in limiting the liability to cases where the " nuisance is placed on or near and in respect to his own property; " but when it is erected by his express *direction*, we can perceive no " reason for the limitation. It is not the structure itself, but its char- " acter as a nuisance, that causes the injury and creates the liability.

" If the mode and manner which constituted the defect by which " the injuries complained of were occasioned, had been inherent in the " plan, and this plan had been devised by Laird and Chambers, which " the contractors were simply engaged to carry out, then *liability* " *would attach to Laird and Chambers*, for injuries occurring in its " progress as well as afterwards."

Hay on Liability, p. 77.

VIII.

When this case was before court the other time, it was sought to be shown that Robbins had let out the job of making the excavation in the street, to a contractor, and therefore, if any body was to blame, it was the contractor. But in this case, no contract whatever is shown to have existed which *included* the *taking care* of this area; and not a word of evidence was given as to that fact. The contracts which

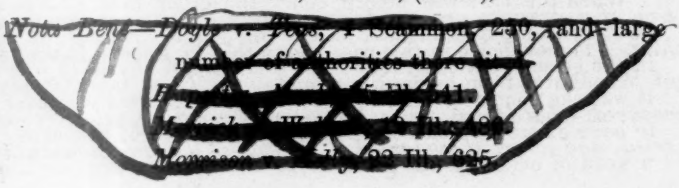
he had let for the erection of the building had, as the evidence shows, all expired by their own limitation—had never been renewed, and he was, at the time Woodbury fell into the area, for all that appears to the contrary, in the full and complete control of each and every part of the building, from area to attic.

A great deal has been said, first and last, in the case, about contracts and contractors; but there is not a word, in all of the evidence, that goes to show that, in any contract which ever was made, that it was provided that the contractor or contractors should guard and protect this particular area—which was between four and five feet in width,—between seven and eight feet deep, and nearly a hundred long. It may be very convenient for Robbins to shift his responsibility over to some contractor, when it is known that he not only made this hole under the side-walk to suit his own purposes, but that he *left it open, unguarded and unprotected*, at the corner of one of the most public streets in that great and crowded city—by which he endangered the life of every passer-by. This court will not, we think, be apt to listen with much patience to the plea, that this area was made by contract, or *left open, unguarded and unprotected*, BY contract!

IX.

The charge of the Judge to the jury was a most complete and exact digest of both the law and the facts in the case; and "it is not error for a Judge of the Circuit Court to disregard the written points of counsel and charge the jury *in his own way*, if he submits the facts fairly, and gives his opinion fully, on the questions of law arising in the case."

Law v. *Cross*, 1 Black, (U. S.), 537.



The record does not purport to contain *all* of the evidence in this case, and, consequently, the only thing which this court is called upon to decide is, whether the two exceptions, which the plaintiff in error took, to the charge of the judge, to the jury, were well taken.

They are as follows:

1st. "So much of the charge as related to the notice to Robbins, "of the pendency of the suit of William H. Woodbury against the "city of Chicago.". And

2nd. To so much of the charge as related "to the construction of *the area.*"

Now, the first point, we have discussed in another portion of this brief. What is or is not notice to a party, always depends upon the particular facts and circumstances of each particular case.

The law does not require a written notice, or a printed notice, or any particular form or ceremony to be gone through with, *in order to constitute notice.* It simply requires that certain facts shall be brought to the knowledge of the party, which puts him on inquiry, and which enables him to know, if he desires, all about the particular matter in question, and which *affords him the opportunity, and enables him to defend himself*, if he wishes, from any charges which may be brought against him. Time, place and opportunity are circumstances, which not only juries may take into consideration, but courts also.

That Robbins knew that Woodbury had been injured, by falling into *the area of his building*, stands admitted in the record. That fact was *admitted, in writing*, by Robbins, and is among the papers in this case. Therefore, to begin with, *he neither occupied the position of a stranger, nor was he innocent of the charges brought against him.* The evidence in this case shows that he knew all about the case of Woodbury, from beginning to end. *He knew when it was commenced, what it was for, where it was pending, when it was to be tried, and where it was tried. He was in the court house at the very*

time it was called for trial—and his feet on the very threshold of the court room—and it was *his duty* to have gone in and helped defend the case. He had every opportunity in the world afforded him, to have gone in and assisted in the defence of the suit—but he refused. Robbins was a man of colossal fortune, and was possessed of abundant means to employ counsel, and could have had the ablest in the do it.

case in equity, commencing at page 152, pon the subject of notice, and it is there held, ry in *any* case to constitute notice, that it e of a distinct and formal communication, and *ll* cases, where a party is shown to have had ing himself, as to justify the conclusion that he ave availed himself of them"—page 160, and

On page 154, in speaking of notice to purchasers of property, the author says: "It should be remembered, that a purchaser will have "notice whenever he has the *means* of knowledge *although he may* "*choose not* to know, or in other words, whenever it may fairly be "presumed that he *either knew or remained wilfully* ignorant."

Now, what *is the reason* that this same rule does not apply to this case? Is there any peculiar and extenuating circumstance presented to the court why Robbins should not be held to this rule?

As a question of ethics, we should say that, under such circumstances, to plead—that Robbins did not know anything about the Woodbury case; was a stranger to it, and not bound by the judgment, was neither a moral or a legal defence. But we regard it useless to elaborate upon this subject.

This point has been discussed over and over again, in all its length and breadth, and if any question ever was settled, this question of the

notice to Robbins has been settled by *by this court, in this very case.*

2d. As to the second exception taken, we reply, that we do not complain of anything in regard to the peculiar "construction of the area" by Robbins, and we know of no such question in this case. We complain of him on entirely different grounds. We complain of him, not for any negligence in *constructing* the area, but for *leaving it open, unguarded and unprotected* after it was constructed, whereby Woodbury fell in and was injured.

FINALLY.

1. Was not the duty *absolute* and *imperative* upon Robbins to see that the excavation, which he caused to be dug, should be carefully guarded and protected. Was it the business of the city to superintend the erection of this building of Robbins'? Was it the business of any contractor? If so, what particular one?—and where is the evidence of any such thing?

2. Robbins, without any *special authority* whatever from the city authorities, caused an excavation to be made in a public street, in the city of Chicago, of about 100 feet long, 10 feet deep, and 12 feet wide. It was made *for his sole and exclusive use and benefit.* It was left *unguarded and unprotected by Robbins*, or those *under his control*, and one Woodbury walked into it in the night, while using due care in passing along the street, and was severely injured. And upon this point, we again call attention to the case of *Godfrey* v. *City of Alton*, 12 Ill. 20.

3. Robbins had been repeatedly warned by the city superintendent that the hole *was left open, unguarded,* and *unprotected;* and a *formal notice in writing* was sent to him by the city superintendent, *warning* and *cautioning* him about it.

time it was called for trial—and his feet on the very threshold of the court room—and it was *his duty* to have gone in and helped defend the case. He had every opportunity in the world afforded him, to have gone in and assisted in the defence of the suit—but he refused. Robbins was a man of colossal fortune, and was possessed of abundant means to employ counsel, and could have had the ablest in the land, but he would not do it.

In the second leading case in equity, commencing at page 152, there is a large essay upon the subject of notice, and it is there held, that "it is not necessary in *any* case to constitute notice, that it "should be in the shape of a distinct and formal communication, and "it will be implied in *all* cases, where a party is shown to have had "such means of informing himself, as to justify the conclusion that he "might and ought to have availed himself of them"—page 160, and authorities there cited.

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1. Was not the duty *absolute* and *imperative* upon Robbins to see that the excavation, which he caused to be dug, should be carefully guarded and protected. Was it the business of the city to superintend the erection of this building of Robbins'? Was it the business of any contractor? If so, what particular one?—and where is the evidence of any such thing?

2. Robbins, without any *special authority* whatever from the city authorities, caused an excavation to be made in a public street, in the city of Chicago, of about 100 feet long, 10 feet deep, and 12 feet wide. It was made *for his sole and exclusive use and benefit.* It was left *unguarded and unprotected by Robbins*, or those *under his control*, and one Woodbury walked into it in the night, while using due care in passing along the street, and was severely injured. And upon this point, we again call attention to the case of *Godfrey* v. *City of Alton*, 12 Ill. 20.

3. Robbins had been repeatedly warned by the city superintendent that the hole *was left open, unguarded,* and *unprotected;* and a *formal notice in writing* was sent to him by the city superintendent, *warning* and *cautioning* him about it.

4. Robbins *promised* to have the hole guarded and protected, but *did not.*

5. The *excavation* was *probably* carefully and skilfully dug; for it was dug under the *immediate supervision of Robbins' agent,* Van Osdell, who was employed by Robbins, and was *paid by him.* But the *manner* of digging the hole is *not* what is complained of. The complaint is, that after Robbins had been repeatedly warned and notified of the dangerous character of the excavation, he yet left it entirely open and unguarded, by which a stranger fell in and was injured.

6. To leave such a hole open, unguarded and unprotected in a public street in a great city, is a most reckless and careless act. And *such a hole,* left open, is not only—

7—A nuisance, but a *continuing* nuisance.

8. And, if a *nuisance,* it is no answer for the owner of the property to make, that he did not *contract* to have a *nuisance* made. No contract can shield the owner of property from injuries arising from *nuisances* which are *created* on his own land; much less when a person *causes* or creates them, or does acts which *result* in a nuisance in in the public street.

9. At the time of the accident, Robbins was in full possession of his premises, and no contract existed between himself and any person in regard to the *excavation.*

10. The city, owing to its *primary duty* to the public, is *primarily* liable; but having been obliged to pay for injuries occasioned in consequence of the street being in a bad condition, and which was caused by Robbins interfering with the same; and—

11. Robbins having been *notified* of the pendency of the suit brought by Woodbury against the city, and having failed to appear and make any defence, is

12. *Concluded* by the judgment of Woodbury.

13. The case of the *City of Chicago* v. *Robbins*, 2 Black, 419, is the law of the land; and is decisive of all the questions involved in this case.

14. For these reasons, I respectfully submit to the court that the judgment in this case should be affirmed.

ELLIOTT ANTHONY,

Attorney for Plaintiff in Error.